الاشارة في اصول الفقه

للقاضي أبي الوليد الباجي الاندلسي (٤٠٢ ـ ٤٧٤هـ)

حققه و قدم له و علق عليه و ترجمه الى اللغة الانجليزيه

طفيل احمد القرشي

مقالة قدمت الى :

قسم تقابل الاديان و الثقافة الاسلامية جامعة السند، حيدرآباد الباكستان

لنيل درجة للدكتورا

سنه ١٣٩٢هـ ـ سنه ١٩٧٢م

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(٧) كون الخبر مرويا عن صاحب القصة

(٨) عمل اهل المدينة على الخبر

(٩) كون الرواية أشد تقضيا للحديث

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(٣) ان تكون أحد العلتين موافقة للفظ الاصل

(٤) ان تكون أحد العلتين مطردة منعكسة

(٥) ان تكون احد العلتين لیشهد لها أصول كثيرة

(٦) اذا كان أحد القياس رد الفرع الى جنسه

(٧) أن تكون احد العلتين واقفة

(٨) ان تكون احدهما لا يعم فروعها

(٩) أن تكون احد العلتين عامة

(١٠) أن تكون احد العلتين منتزعة من اصول منصوص عليها

(١١) أن تكون احد العلتين كثيرة الأوصاف ·

(١)

المكتبة الازهـــــرية

اصول الفقه : ١٧٠
رقم مخصوص : ٥٧٨٦
رقم التصويرة : ٨٠ من ١٠٤

اسم الكتاب : الاشارة فى اصول الفقه (١)

اسم المولف : ابو الوليد سليمان بن خلف الاندلسى الباجى ٤٧٤ هـ

تاريخ النسخ : ٧٩٢ هـ
عدد اوراق :
القياس : ١٤ × ١٨ سم
الملاحظات نسخة مجموعة من رقم ٢٩/ ٤٥

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(١) فى نسخة م : الاشارة للباجى رحمه الله - و عكس هـذه الورقة اخـذ مـن النسخة ق -

بسم الله الرحمن الرحيم

صلى الله على محمد و على آله وسلم تسليما : عونك اللهم يا معين

(بــــــــا ب)

اقسام ادلـة الشـــرع

ادلة الشـرع على ثلثـة اضـرب :-

(١) اصـــل

(٢) و معقول اصـــل

(٣) و استصحاب حـــال

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(١) الكتـــا ب و

(٢) الســـنة و

(٣) اجماع الامـــة -

و اما معقول الاصل فهـــو لحـــن الخطـــــاب

و اما استصحاب الحال فهو استصحاب حال العقل (١)

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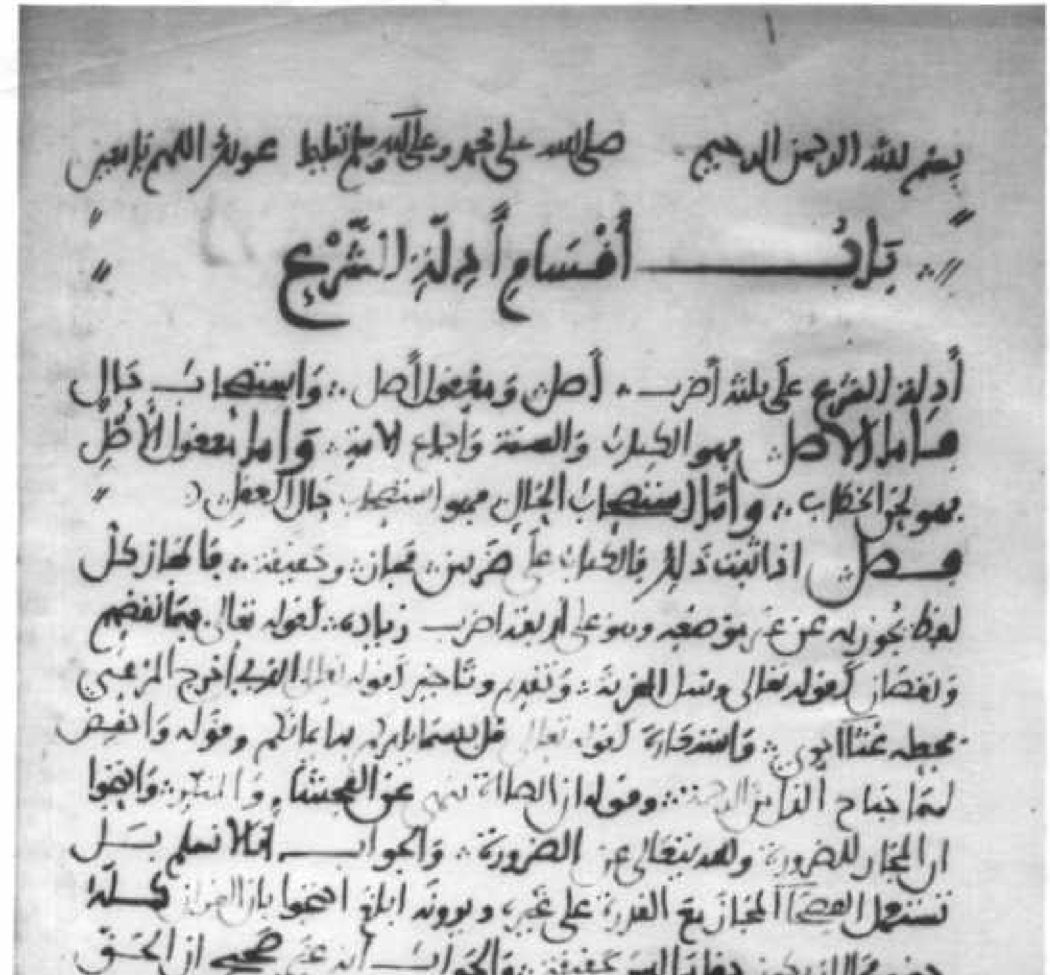
(١) فى ت : الاصل


بسم الله الرحمن الرحيم صلى الله على محمد وعلى آله وسلم تسليما

باب أقسام أدلة الشرع

أدلة الشرع على ثلاثة أضرب: أصل، ومعقول أصل، واستصحاب حال.
فأما الأصل فهو الكتاب والسنة وإجماع الأمة. وأما معقول الأصل
فهو لحن الخطاب، وأما استصحاب الحال فهو استصحاب حال العقل

The opening folio of Al-Bājī's "al-Ishārah fī uṣūl al-Fiqh"
Escorial MS, No. 1107 Madrid, Spain.

الجـــــز ٔ الاول : الاصـــــــل

الكتاب

باب ١ : اقسام الكلام

فصل ١ : المجاز

اذا ثبت ذلك فالكتاب على ضربين :

(١) مجاز و

(٢) حقيقة

فالمجاز "كل لفظ يجوز به عن غير[1] موضعه" -

و هو على اربعة اضرب : -

(١) زيادة - كقوله تعالى « فبما نقضهم (٢)

(٢) نقصان - كقوله تعالى « و سئل القرية[3]

(٣) تقديم و تاخير - كقوله تعالى « الذى اخرج المرعى فجعله غثاء احوى[4] -

(٤) استعارة - كقوله تعالى (١) قل بئسما يأمركم به ايمانكم -[5]

(٢) و قوله و اخفض لهما جناح الذل من الرحمة -[6]

(٣) و قوله ان الصلوة تنهى عن الفحشاء و المنكر -[7]

و احتجوا ان المجاز للضرورة و الله يتعالى عن الضرورة -

و الجواب انا لا نسلم بل يستعمل الفصحاء المجاز مع القدرة على غيره و يرونه ابلغ -

احتجوا بان القرآن كله حق ، و محال ان يكون حقا ما ليس بحقيقة ـ

و الجواب انه غير صحيح ان الحق ليس من الحقيقة لسبيل ـ

و لذلك اجتمع كل واحد منهما مع ضد الاخر ـ فيصدق اذا قلت ،

" الاسد فى الدار" ، و فيها رجل شجاع ، و يكذب اذا قلت ، " زيد فى الدار " و ليس فيها احد ـ

و قد قال محمد بن خويز منداد (٧) من اصحابنا و داود الاصبهانى (٨) انه لا يصح وجود المجاز فى القرآن و قد بينا ذلك

فصل ٢ : الحقيقة

و اما الحقيقة فهو " كل لفظ بنى على موضوعه" ،

و هو على ضربين :

(١) مفصول و (٢) مجمل

فاما المفصل ، فهو ، " ما علم المراد به من لفظه فلم يفتقر فى بيانه إلى غيره" ·

و هو على ضربين :

(١) غير محتمل و

(٢) و محتمل ـ

فاما غير المحتمل فهو " النص وحده ما يرفع فى بيانه الى ارفع غاياته " ،

نحو قوله تعالى ، " و المطلقت يتربصن بانفسهن ثلاثة قروء" (٩)

فهذا نهى و الثلاثة لا يحتمل غير ذلك ـ

فاذا ورد وجب المصير إليه والعمل به الا ان يرد (م/٢ب) ناسخ او معارض

فصـــل ٣ : المحتمـــــل

و اما المحتمل فهو " ما احتمل معنيين فزائدا " ،

و هو على ضـــربين :ـ

احد هما الا يكون فى احد محتملاته اظهر منه فى سايرها

نحو قولك " لون " الذى يقع على البياض و السواد و غيرها من الالوان

و توحا واحداء؟ليس هو فى احد فى احد محتمـــلاته اظهـــر منـه

فى سايرها فاذا قال من يلزمك أمـــره ،" اصبغ هذا الثـــوب لوناً " ،

فان كان ذلك على معنى التخيير فأى لون صبغت كنت ممتثلا لامـــره ،

و ان اراد لذلك لونا بعينه لم يمكنك امتثال امره الا بعد ان يبيـــن

اللون الذى اراده

و لا يجوز أن يتأخر البيان عن وقت الحاجة الى امتثال الفعل

و الثانى ان يكون اللفظ فى احد محتملاته اظهر منه فى سايرها

كالفاظ الظاهر و العموم .

فصـــل ٤ : الظاهـــــر

فاما الظاهر فهو " المعنى الذى يسبق الى فهم سامعه من

المعانى التى يحتملها اللفظ " ـ

كالفاظ الاوامر ، نحو قوله تعالى :

(١) اقيموا الصلوة و اتوا الزكاة (١٠) ـ

(٢) و اقتلوا المشركين (١١) ـ

فهذا اللفظ اذا ورد وجب حمله على الامر ـ

و ان كان يجوز أن يراد به :

(١) الاباحة ، نحو قوله تعالى " و اذا حللتم فاصطادو "[١٢] و

(٢) التعجيز : نحو قوله " كونوا حجارة او حديد "[١٣] و

(٣) التهديد ، نحو قوله تعالى ، " اعملوا ما شئتم انه بما تعملون بصير "[١٤] و

(٤) التعجب : نحو قولك " احسن بزيد " و قد قيل ذلك فى قوله تعالى : " اسمع بهم و ابصر يوم ياتوننا "[١٥]

الا انه اظهر <منه> فى الامر <من> ساير محتملاته - فيجب ان يحمل على انه امر الا ان ترد قرينة تدل على ان المراد به غير الامر فيعدل عن ظاهره الى ما يدل عليه الدليل -

بـاب ٢ : الامـــر

فصل ١ : تعريف الامر و اقسامه

اذا ثبت ذلك فالامر " اقتضاء الفعل و القول على وجه الاستعلاء و القهر و القصر ، "

و هو على ضربين :

(١) واجب و

(٢) مندوب اليه

فالواجب " ما كان فى تركه عقاب من حيث هو ترك له على وجه ما

نحو قوله تعالى : " اقيموا الصلاة و اتوا الزكاة[١٦]

و المندوب اليه : " هو المامور به الذى فى فعله ثواب و ليس

فى تركه عقاب من حيث هو ترك له على وجه ما -

نحو قوله تعالى : " فكاتبوهم ان علمتم فيهم خيرا و اتوهم

من مال الله الذى اتاكم ".[١٧]

الا ان لفظ ~~فى لفظ~~ الامر فى الوجوب ~~اظهر منه فى الوجوب~~

م / ٣ ـ ا اظهر منه فى الندب (م/٣-ا)

فاذا ورد لفظ الامر عاريا من القرائن حمله على الوجوب الا ان

يدل دليل على الندب يراد به فيحمل عليه -

و قال القاضى ابوبكر يتوقف فيه و لا يحمل على وجوب و لا ندب

حتى يدل الدليل على المراد به -

ق /١ ـ ب و قال ابو الحسن بن النشاب[١٨] و ابو الفرج (١٩) (ق / ١ ـ ب)

يحمل على الندب و لا يعدل به الى الوجوب الا بدليل -

و الدليل على ما نقول قوله تعالى لابليس : ما منعك ان تسجد

اذ امرتك[٢٠] فوبخه و عاتبه لما يمتثل امره بالسجود اللازم و لو لم

يكن مقتضاه الوجوب لما عاقبته و لا وبخه على ترك ما لا يجب عليه

فعـــله -

فصـــل ٢ : صيغة الامر بعد الحظر[١]

اذا وردت لفظة افعل بعد الحَظر اقتضت الوجوب ابقاءً على اصلها

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(١) هذا الفصل غير موجود فى م

و قال جماعة من اصحابنا انها تقتضى الاباحة و به قال بعض اصحاب الشافعى

و الدليل على ما نقوله انا قد اجمعنا على ان لفظ الامر بمجرده يقتضى الوجوب و هذا اللفظ الامر مجرده فوجب ان يقتضى الوجوب ، و تقدم الخطر على الامر لا يخرجه عن مقتضاه ـ كما ان تقدم الامر على الخطر لا يخرجه عن مقتضاه

فصل ٣ : الامر المطلق

الامر المطلق لا يقتضى الفور

و اليه ذهب القاضى ابوبكر و ذكر محمد بن خويز مقداد انه مذهب المغاربة من المالكين و قال اكثر المالكيين من البغداديين انه يقتضى الفور

و الدليل على ما نقوله ان لفظ " افعل " لا يتضمن الزمان إلا كتضمن الاخبار عن الفعل للزمان و لو ان مخبرا يخبر انه يقوم لم يكن كاذبا اذا وجد قيامه متاخرا . فكذلك من امر بالقيام لا يكون تاركا لما امر به اذا وجد منه القيام متاخرا

فاذا ثبت ذلك فالواجب على التراخى حالة تعين وجوب الفعل فيها و هو اذا اغلب على ظن[1] المخاطب (ق/ ٢ ـ ا) فوات الفعل و تجرى اباحة تاخير المكلف الفعل مجرى اباحة تعزير الامام و الجانى و تاديب المعلم للصبى اذا لم يغلب على الظن هلاكه فاذا غلب على الظن هلاكه حرم ذلك .

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(١) فى ق : و هو اذا غلب على ظنه .

فصـــــل ٤ : نسخ وجوب الامـــر

اذا نسخ وجوب الامر جاز ان يحتج به على الجـــواز ــ
و قال بعض اصحابنا ومنهم القاضى ابو محمد لا يجـوز ذلك
و الدليل على ما نقوله ان الامر بالفعل يقتضى وجوب الفعل
و جوازه ــ و الجواز الزم له لانه قد يكون جايزا و لايكون واجبا
و محال ان يكون واجبا و لا يكون جايزا ــ لانه يستحيل ان يوصر بفعل ما لا يجوز له فعله ــ و معنى الجايز هاهنا ما وافق الشرع ــ
فاذا ثبت ذلك و نسخ الوجوب خاصة بقى على حكمه فى الجواز ــ
لان النسخ لم يتعلق بالجواز و انما تعلق بالوجوب دونه ــ

فصـــــل ٥ : المسافر و المريض ماموران بصوم رمضان

المسافرو المريض ماموران بصوم [١] رمضان مخيران بينه وبين صوم غيره ــ
و قال بعض اصحابنا المسافر مخاطب بالصوم دون المريض (م/ ٣ ب) م / ٣ ــ ب
و قال الكرخى المسافر و المريض غير مخاطبين بالصوم
و الدليل على ما نقوله ان المسافر لو صام اثيب على فعله و ناب صومه عن فرضه فلو كان غير مخاطب بصومه لما اثيب عليه كا الحايض لما لم مخاطب بالصوم لم تثب عليه [ب] ــ

فصـــــل ٦ : الكفار مخاطبون بالايمان

لا خلاف بين الامة ان الكفار مخاطبون بالايمان و الظاهر من

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(١) فى ق : بصيام
(ب) فى ت : لما لم تخاطب بالصوم لم تثب فى حال حيضها

مذهب مالك رحمه الله انهم مخاطبون بالصوم و الصلوة و الزكاة وغير ذلك من شرائع الاسلام (ب)

ق /٢ـ ب و قال محمد بن خويز منداد (ق/٢ـ ب) ليسوا بمخاطبين بشى من ذلك

و الدليل على ما نقوله قوله تعالى «ما سلككم فى سقر قالوا لم نك من المصلين و لم نك نطعم المسكين ....

فاخبر الله تعالى ان العذاب حق عليهم بترك الايمان و الصدقة والصلوة

فصـــل ٧ : امر النبى عليه السلام و حمله على الوجوب

اذا قال الصحابى رضى الله عنه امرنا رسول الله صلى الله عليه وسلم بكذا وكذا ونهانا عن كذا وكذا وجب حمله على الوجوب .

و حكى عن ابى بكر بن داود انه لايحمل على الوجوب حتى ينقل اليه(جـ) لفظ الرسول عليه السلام

و ما قاله ليس بصحيح لان معرفة الامرمن غيره طريقة اللغة (د)

و اذاكنا نحتج فى اللغة والتميز بين الامر وغيره بقول امرئ القيـــس و النابغة و ان نحتج بقول ابى بكر و عمر رضى الله عنهما اولى و احرى لكونهما من افصح العرب ولما يقترن بذلك من (ر) الدين و الفضائـل .

(ا) فى ق : بصيام

(ب) فى م : الايمان

(جـ) فى ق : الينا

(د) فى ق : لأن معرفة الامر لا تعرف من غير طريقة اللغة

(ر) فى ق : من امور الدين

باب ٣ : مسائل النهى (الذى ذهب اليه اهل السنة)

ان الامر بالشئ بمعنى عن اضداده و النهى عن الشئ امر باحد اضداده _

و النهى ينقسم قسمين : (١) نهى على وجه الكراهة

(٢) و نهى على وجه التحريم

(١) الا ان النهى اذا ورد وجب حمله على التحريم الا ان تقترن به قرينة تصرفه عن ذلك الى الكراهية _

(٢) و النهى اذا ورد دل على فساد المنهى عنه

و بهذا قال جمهور الفقهاء من اصحابنا و غيرهم

و قال القاضى ابوبكر لا يدل على ذلك

و الدليل على ما نقوله اتفاق الامة من الصحابة فمن بعدهم على الاستدلال بمجرد النهى فى القرآن و السنة على فساد العقد النهى عنه ، كاستدلالهم (١) على ز:

(١) فساد عقد الربا بقوله تعالى ، و ذروا مابقى من (٢٢) الربا

م/ ٤ _ ا (٢) و نهى النبى عليه السلام (م/ ٤ _ ا) عن بيع الذهب بالذهب (٢٣) متفاضلا

(٣) و احتجاج ابن عمر رض فى تحريم نكاح المشركات و فساده

ق/ ٣ _ ا لقوله تعالى لا تنكحوا المشركات (٢٤) (ق/ ٣ _ ا) و غير ذلك مما لا يحصى كثرة (ب)

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(١) ف... استدلاله (ب) ف ق : اكثره

باب ٤ : العموم و الخصوص

فصل ١ : الفاظ العموم

قد ذكرنا ان المحتمل الظاهر فى احدى محتملاته منه ضربان :

(١) أوامر و

(٢) عموم

وقد تكلمنا فى الاوامر والكلام هاهنا فى العموم وله الفاظ خمسة منها :

(١) لفظ الجمع كالمسلمين و المومنين و الابرار و الفجار و

(٢) الفاظ الجنس كالحيوان و الابل

(٣) و الفاظ النفى كقولنا ماجاءنى من احد — و

(٤) الالفاظ المبهمة (١) كمن فيمن يعقل و "ما" فيما لا يعقل و"أى" فيهما و متى " فى الزمان و أين فى المكان و

(٥) الاسم المفرد اذا دخل عليه الالف و الام نحو قولنا الرجل و الانسان و المشرك

فهذا اذا ورد اقتضى أمرين :—

(١) احدهما ان يراد به واحد بعينه و ذلك لايكون الابقرينة عهد —

(٢) و الثانى ان يراد به جميع الجنس فاذا ورد عاريامن القرائن دل على جميع الجنس

و الدليل على ذلك اتفاقنا على انه معرفة بالعهد او باستيعاب الجنس — فاذا لم يكن عهد حمل على استيعاب الجنس و الا كان ذكرة و من الفاظها الاضافة الى باتمح الاضافة اليه من الفاظ العموم نحو قوله عليه السلام فى سايمة الغنم الزكاة(٢٥)

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(١) اى التى لاتتضح معانيها ولاتعلم منها على التعيين كاسماء الشرط

فصـل ٢ : حكم الفاظ العموم

اذا ثبت ذلك فاذلو ورد شئ من الفاظ العموم المذكورة وجب حملها على عمومها (و لاخصوص) الا ان يدل الدليل على تخصيص شئ منها فيصير الى ما يقتضيه الدليل

و قال القاضي ابوبكر يتوقف فيها و لا يحمل على عموم و لا خصوص حتى يدل الدليل على المراد بها ـ

و قال ابو الحسن بن الساب يحمل على اقل ما تقتضيه الالفاظ

ق/٤ ـ ١ و الدليل على ما تقوله ما قدمناه من كونها (ق/٤ ـ ١) معرفـة و انما تكون معرفة اذا اقتضت استغراق الجنس فيتميز ما يقع تحتهـا من غيره و لو لم يرد بها جميع الجنس لكانت نكرة لا يتميز المراد بها عن غيره اذا قد بقي من جنسه ما يقع عليه هذا اللفظ (١)

فلذلك قلنا ان لفظ العموم اذا نكر لا يقتضي استغراق الجنس لانه لو اقتضى استغراق الجنس لكان معرفة ـ

فصـل ٣ : تخصيص الفاظ العمـوم

م/٤ ـ ب (م / ٤ ـ ب) فاذا دل الدليل على تخصيص الفاظ العموم بقي ما بقي يتناوله اللفظ العام بعد ذلك التخصيص على عمومه ايضا يحتج به كما يحتج به لو لم يخص شئ منه

و ذلك نحو قوله تعالى « و اقتلوا المشركين (٢٤)

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(١) في ق : ما يقع تحتها و غيره اذ قد بقي من جنسه مالم

فان هذا لفظ يقتضى قتل كل مشرك ثم قد خص ذلك بان منع من قتل من ادى الجزية من اهل الكتاب و بقى الباقى على ما كان عليه من وجوب القتل نحتج به فى وجوب قتل المشركين غير من قد خرج بالتخصيص المذكور — و كذلك :

(١) لو ورد تخصيص آخر لبقى باقى اللفظ العام على ما كان عليه قبل التخصيص —

(٢) و يجوز ان يرد التخصيص و البيان مع اللفظ العام و

(٣) يجوز تاخره عنه الى وقت فعل العباد و

(٤) لايجوز ان يتاخر عن ذلك الوقت —

فصـــل ٤ : اقل الجمع اثنـــان

اقل الجمع اثنان عند جماعة من اصحاب مالك

و حكى القاضى ابن الطب انه مذهب مالك رحمه و

و قال بعض اصحابنا و اصحاب الشافعى اقل الجمع ثلاثة —

و الدليل على ما ذهبنا اليه[ب] قوله تعالى :

(١) و داود و سليمان اذ يحكمان فى الحرث اذ نفشت فيه

ق/ ٤ — ب غنم القوم و كنا لحكمهم شاهدين[٢٧] (ق/ ٤ — ب)

(٢) و قوله تعالى " اذهبا بآياتنا انا معكم مستمعون[٢٨]

و حكى انه مذهب الخليل و سبويه و انشدا فى ذلك قول النابغه

" و مهمهين قذفين مرتين — ظهرا هوا مثل ظهور الترسين[٢٥]

(ب) فى ق : ما نقوله

فصـــل ٥ : الفـــاظ الجمـــع

اذا ورد لفظ جمع المذكر لم يدخل فيه جماعة المونث الا بدليـــل

لكل طائفة لفظا ما يختص به فى اللغة ـ قال الله تعالى " ان المسلمين و المسلمات و المومنين و المومنات [٣٠] و قال بعض اهل اللغة ان الوا و فى الجمع السالم يدل على خمسة اشيا وعلى :ـ

على (١) التذكير و (٢) السلامة و (٣) الرفع (٤) و الجمع و (٥) من يعقل فلا يجوز ان يقع تحت مونث الا بدليل كما لا يقـــع تحت ما لا يعقل الا بدليل .

فصـــل٦ : يحمل كل لفظ على مقتضـــــاه

اذا ثبت ذلك فقد يرد اول الخبر عاما و آخره خاص و يرد آخره عاما و اوله خاص " يجب ان يحمل كل لفظ على مقتضاه " و لا يعتبر بسواه ـ

و ذلك نحو قوله تعالى ه " و المطلقات يتربصن بالنفسهن ثلاثة قروء [٣١] ـ

و هذا عام فى كل مطلقة مدخول بها رجعية كانت او باينه

ثم قال بعد ذلك " و بعولتهن (م/٥ـ١) ـ أحـق بردهن فى ذلك [٣٢] م /٥ـ١

و هذا خاص فى الرجعية

و مما خص اوله و عم آخره قوله تعالى ه " ايها النبى اذا طلقتم

النساء . فطلقوهن لعدتهن(٣٣) .

فصــــل ٧ : اذا تعارض لفظان خاص و عام

اذا تعارض لفظان خاص و عام بنى الخاص على الخاص سواء كان الخاص متقدما او متاخرا

ق / ٥ـ ١ و قال ابوحنيفة اذا كان العام متاخرا / ق / ٥ـ ١) ثم نسخ الخاص المتقدم على العام

و الدليل على ذلك مثل ما روى عن النبى عليه السلام انه قال لا صلاة بعد العصر حتى تغرب الشمس(٣٤)

فاقتضى ذلك نفى كل صلواة بعد العصر

ثم قال من نام عن صلاة او نسيها فليصليها اذا ذكرها(٣٥)

فاخرج بهذا اللفظ الخاص الصلاة المنسية من جملة الصلوة المنهى عنها بعد العصر سواء كان الخاص متقدما او متاخرا

و قال ابوحنيفة اذا كان الخاص متقدما نسخه العام المتاخر ـ و ان كان العام متفقا عليه و الخاص مختلفا فيه قدم العام على الخاص ـ

و الدليل على ما نقوله ان الخاص يتناول الحكم على وجه لا يحتمل التاويل و العام يتناوله على وجه يحتمل التاويل فكان الخاص اولى به ـ

فصــــل ٨ : اذا تعارض اللفظان بما لا يمكن الجمع بينهما

(١) و اذا تعارض اللفظان على وجه لا لم يمكن الجمع

بينهما فان علم التاريخ فيهما نسخ المتقدم بالتاخر

(٢) و ان جهل ذلك نظر فى ترجيح احدهما على الاخر بوجه من وجوه الترجيح التى تاتى بعده

(٣) فان امكن ذلك وجب المصير الى ما يرجح

(٤) فان تعذر الترجيح فى احدهما ترك النظر فيهما و عدل الى ساير ادلة الشرع مما دل عليه الدليل اخذ به

و ان تعذر فى الشرع دليل على حكم تلك الحادثة كان الناظر مخيرا بان ياخذ بأى لفظين شاء الحظر او المبيح اذ ليس فى العقل حظر و لا اباحة .

فصل ٩ : يجوز تخصيص عموم القران بخبر الواحد

(١) يجوز تخصيص عموم القرآن بخبر الواحد و عليه جمهور الفقهاء و

(٢) يجو تخصيص عموم السنة بالقرآن و تخصيص عموم القرآن /(ق/ ٥ ب) و اخبار الاحاد بالقياس الجلى و الخفى — ق/ ٥ ب

لان ذلك جمع بين دليلين. و متى امكن الجمع بين دليلين كان اولى من اطراح احدهما و الاخذ بالاخر لان الادلة انما اقتضت للاخذ بها و الحكم بمقتضاها فلا يجوز اطراح شئ منها ما امكن استعماله

فصـــل ١٠ : يقع التخصيص بمعان من افعال النبى عليه السلام [١]

(١) و قد يقع التخصيص ايضا بمعان من افعال النبى عليه السلام و اقرار على الحكم و ما جرى مجرى ذلك

(٢) و لا يقع التخصيص بمذهب الراوى

و ذلك مثل ما روى ابن عمر عن النبى عليه السلام انه قال المتبايعان بالخيار مالم يفترقا [٣٦]

و قال ابن عمر التفرق بالابدان

فذهب اصحابنا و اصحاب الشافعى الى انه يقع التخصيص بذلك

و ذهب مالك رحمه الله الى انه لا يقع به التخصيص و هو الصحيح — لان الاحكام اما تؤخذ [ب] من قول صاحب الشرع و لا يجوز ان يطرح قول صاحب الشرع لقول غيره ٠

فصـــل ١١ : اقسام اللفظ العام الوارد ابتداء

هذا الكلام فى اللفظ العام الوارد ابتداء ٠—

فان الوارد على سبب فانه على ضربين :—

(١) مستقل بنفسه و

(٢) غير مستقل بنفسه —

(١) فاما المستقل لا بنفسه مثل ما يروى عن النبى عليه السلام انه سئل عن بير بضاعة فقال الماء طهور لا ينجسه — شئ [٣٧]

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(١) عنوان الفصل غير موجود فى م (ب) فى ق : لا تؤخذ الامن قول

بمثل هذا اللفظ العام اختلف اصحابنا فيه فروى عن مالك رضى الله عنه انه يقصر على سببه و لا يحمل على عمومه و روى عنه ايضا انه يحمل على عمومه ولا يقصر على سببه (ق/ ٦ ـ ا) و اليه ذهب اسمعيل القاضى و اكثر اصحابنا ـ ق/ ٦ ـ ا

و الدليل على ذلك ان الاحكام متعلقة بلفظ صاحب الشرع دون لأن لفظ صاحب الشرع لو انفرد لتعلق به الحكم و السبب لو انفرد لم يتعلق به حكم فيجب ان يكون الاعتبار بما يتعلق عليه الحكم دون ما لا يتعلق به الحكم ـ

و اما ما لا يستقل بنفسه فمثل ما سئل صلى الله عليه وسلم عن بيع الرطب بالتمر فقال أينقص الرطب اذا جف قالوا نعم قال فلا[٣٨] اذا

فمثل هذا الجواب يقصر على سببه و يعتبر به فى خصوصه وعمومه و لا خلاف فى ذلك نعلمه ـ

باب ٥ : احكام الاستثناء

فصل ١ : اقسام الاستثناء

و مما يتصل بالتخصيص و يجرى مجراه الاستثناء و هو على ضربين :

(١) استثناء يقع به التخصيص و

(٢) استثناء لا يقع به التخصيص

فاما الاستثناء الذى يقع به التخصيص فعلى ثلثة اضرب (١)

(١) استثناء من الجنس

(٢) (استثناء من غير الجنس و

(٣) فاما الاستثناء من الجنس كقولك رايت الناس الا زيدا

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(١) فى م : ضربين

و اما استثناء من الجمله فقولك رايت زيدا الا يده ـ

و اما استثناء من غير الجنس فلا يقع به التخصيص

لانه لا يخرج من الجملة بعدما تناوله و عندى انه يجوز ـ

و قال ابن خويز منداد لا يجوز

و دليلنا قوله تعالى « " و ما كان المومن ان يقتل مومن

الا خطاء[٣٩] ـ

م/ ٦ ـ ا و الخطأ (م/ ٦ ـ ا) لا يقال فيه للمومن ان يفعله و لا ليس

ق/ ٦ ـ ب له ان يفعله لانه ليس بداخل تحت التكليف (ق/ ٦ ـ ب) و قال النابغة[٤٥]

وقفت فيها أصيلانا[ب] اسايلها عيت جوابا وما بالربع[جـ] من أحد

الا الا[د] وارى لاياما أبينها فالنوى[هـ] فالحوض بالمظلومة[س] الجلد[ز]

فصل ٢ : الاستثناء المتصل

الاستثناء المتصل " عمل من الكلام معطوف بعضها على بعض "

يجب رجوعه الى جميعها عند جماعة اصحابنا ـ

و قال القاضى ابوبكر فيه بمذهب الوقف

(ب) أصيلانا : وقت العشاء من بعد العصر الى المغرب
(جـ) الربع : بفتح الراء و سكون الموحدة محلة القوم و منزلهم
(د) النوى : حول الخيمه ليمنع السيل
(س) مظلومه : الارض التى قد حفر فيها فى غير موضع الحفر
(ز) الجلد : الارض الغليظه الصلبه من غير حجارة

و قال المتاخـــرون من اصحاب الـــى حنيفة يرجـــع الـــى اقـــرب مذكـــور اليـــه

و مثال ذلك قوله تعـــالـــى فاجلـــدوهم ثمانـــين جلـــدة و لا تقبلـــوا لهم شهادة ابـــدا و اولئـــك هم الفاسقـــون الا الـــذين تابوا مـــن بعد ذلك..... (٤١)

و الدليل على ذلك ان المعطوف بعضـــه على بعـــض بمنزلة المـــذكور جميعـــه باسم واحـــد و لا فـــرق عنـــدهم بيـــن [مـــن] قال ء اضـــرب زيـــدا او عمـــر او خـــالـــدا و بيـــن مـــن قـــال اضـــرب هـــولاء الثلـــث

و اذا كان ذلك كذلك فلو ورد الاستثناء عقب جملـــة مذكورة باسم واحـــد لـــرد الى جميعهـــا

لكذلك اذ ورد عقب ما عطف بعضه على بعض ـ [و قد اجمعنـــا ان الاستثناء واقع على جميع الجملـــة] ـ

باب ٦ : حكم المقيد و المطلـــق

و ممـــا يتصـــل بالخـــاص و العـــام الكـــ... و المطلـــــــق و نحـــــــن نبـــ...

حكمهما انشاء الله

المقيد يقع بثلاثة اشياء :ـ

(١) الغاية و

(٢) الشرط و ـ

(٣) الصفة ـ

ق/٧ـا فاما الغاية (ق/٧ـا) فقولك ، اضرب زيدا ابدا حتى يرجع الى الحق ـ فلو لا انه قيد الضرب بالرجوع الى الحق لا تقضى ذلك ضربه أبدا ـ

واما الشرط، فقولك "من جاء من الناس فاعطه درهما- فقيل ذلك بالشرط ـ

و اما الصفة فقولك اعط القرشيين المومنين فقيد بصفة الايمان و لو لا ذلك لاقتضى اللفظ كل قرشي

فاذا ثبت ذلك و ورد لفظ مطلق و مقيد فلا يخلوا من ان يكونا[1] (١) من جنسين ،او (٢) من جنس واحد

(أ) فى ق : يكون من جنس واحد او..الخ

فان كانا(ب) من جنسين(جـ) فلا خلاف انه لاكيل المطلق على المقيد ـ لان تقييد الشهادة بالعدالة لا يقتضى تقيد رقبة المطلق بالايمان

و اما ان كانا من جنس واحد(د) فان تعلقا بسببين مختلفين نحو أن تقيد الرقبة فى القتل بالايمان و يطلقها فى الظهار فانه لا
يحمل المطلق على المقيد (م / ٦ ب) عند اكثر اصحابنا الا بدليل م / ٦ ـ ب
يقتضى ذلك ـ

و قال بعض اصحابنا و اصحاب الشافعى يحمل المطلق على المقيد من جهة وضع اللغة

و الدليل على ما نقوله ان الحكم المطلق غير مقيد ـ و اطلاق المطلق يقتضى نفى التقييد عنه كما ان تقيد المقيد يقتضى نفى الاطلاق عنه

فلو وجب تقيد المطلق لأن من جنسه ما هو مقيد لوجب اطلاق المقيد لان من جنسه ما هو مطلق و اما اذا كانا متعلقين بسبب واحد مثل أن ترد الزكاة [فى موضع] مقيدة بالسوم و ترد فى موضع آخر

(ب) فى ق : كان

(جـ) فى ق : من جنس واحد

(د) فى ق : كان من جنسين فلا يخلوا ان يتعلق
هذه العبارة كما هو ظاهر لاتناسب المقام

مطلقة فانه لا يجب عند اكثر اصحابنا ايضا حمل المطلق على المقيد

ق/ ...... و من اصحابنا من اوجب ذلك (ق/ .....) [(أ)] و يسرد في موضعه

الكلام عليه ان شاء الله تعالى .

باب ٧ : بيان حكم المجمل

قد ذكرنا ان الحقيقة على ضربين :

(١) مفسل و (٢) مجمل

و قد مر الكلام في المفسل . و الكلام ههنا في المجمل

و جملته ان المجمل مالا يفهم المراد به من لفظه و يفتقرن

في المعرفة البيان الى غيره

كقوله تعالى « و اتوا حقه يوم حصاده »[(٤٢)] فلا يفهم المراد

بالحق من نفس اللفظ ولابد له من بيان يكشف عن جنس الحق و قدره —

فاذا ورد مثل هذا وجب اعتقاد وجوبه الى ان يرد بيانه فيجب امتثاله —

و قد اختلف اصحابنا في قوله تعالى :

(١) و اتواالزكاة و[(٤٣)]

(أ) اختتام ورق النسخة ق ٧ — ا — المتن غير موجود في النسخة الى بحث حديث المرسل من باب السنة —

(٢) " كتب عليكم الصيام "(٤٤) و

(٣) " لله على الناس حج البيت "(٤٥) و

(٤) " احل الله البيع و حرم الربا "(٤٦)

فذهب قوم من اصحابنا الى انها مجملة

و قال ابو محمد بن نصر(٤٧) ، كلها مجملة الا قوله "

و احل الله البيع و حرم الربا ، " فانه عام -

و قال ابن خويز منداد كلها عامة -

فيجب حملها على عمومها الا خصه الدليل - و هو الصحيح -

و الدليل على ذلك ان كل لفظ من هذه الالفاظ يقتضى فى

اللغة جنسا مخصوصا فالصلاة معناها " الدعاء " فاذا ورد هذا اللفظ

كان امتثاله ما يقع عليه هذا الاسم من الدعاء الا ما خصه الدليل -

لكن الشرع قد خص منه دعاء مخصوصا يتفرق به افعال مخصوصة من

ركوع و سجود و غير ذلك - و الصوم هو " الامساك " لاكن الشرع

قد خص منه امساكا مخصوصا عن اشياء مخصوصة على وقت مخصوص -

م / ٧ - ا و الزكاة (م / ٧ - ا) هو " النماء " و الحج هو " القصد " فكان

ذلك قوله تعالى ، و اقتلوا المشركين(٤٨) ، الذى يقتضى قتل كل مشرك

و قد خص الشرع من ذلك انواعا من المشركين -

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2-8-93

باب ٨ : بيان الاسماء العرفية

فصل ١ : معنى العرف

و مما يتصل بهذا الباب الاسماء العرفية

و معنى قولنا عرفيه ان تكون اللفظة موضوعة في كلام العرب لجنس ما ثم يغلب عليها عرف الاستعمال في بعض ذلك الجنس

(١) نحو قولنا دابة هو اسم موضوع لكل مادب ثم غلب عليه عرف الاستعمال في نوع من الحيوان دون غيره

(٢) و كذلك قولنا " صلاة " هو اسم لكل دعاء في اللغة ثم غلب عليه عرف الاستعمال في نوع من الدعاء على وجه مخصوص .

فصل ٢ : اقسام العرف

اذا ثبت ذلك فعرف الاستعمال يكون من ثلاثة اوجه : -

احدهما اللغة نحو قولنا "دابة" -

و الثانى الشرعية نحو قولنا " صلاة " و " صوم " و حج – و

الثالث عرف الصناعة كتسمية اهل الكتاب " الديوان " زماما و تسمية اهل الابل الخطام زماما و غير ذلك –

فاذا ورد شئ من الالفاظ العرفية وجب حملها على ما عرف بالاستعمال فيه من جهة التى وردت منها –

حواشی

کتاب

(١) سورۃ المائدہ آیہ ١٣ ۔

(٢) سورہ یوسف آیہ ٨٢ ۔ مراد ھاھنا اھل القریہ فحذف المضاف

(٣) سورہ الاعلی آیہ ١٤ ۔ المراد اخرج المرعی احوی ۔

(٤) سورہ بنی اسرائیل آیہ ٢٤ ۔

(٥) سورہ العنکبوت آیہ ٤٥ ۔ الفاظ ۔ ایمانکم ۔ جناح الذل ۔ تنتہی ھھنا الاستعارہ ۔

(٦) سورہ البقرہ آیہ ٢٢٨ ۔

(٧) محمد بن خویز منداد : ھو محمد بن احمد بن عبد اللہ ۔ کنیتہ ابو عبد اللہ ۔ تفقہ علی الابہری و لہ کتاب کبیر فی الخلاف و لہ کتاب فی اصول الفقہ و کتاب فی احکام القران .... و قد قال فیہ الباجی ابو الولید لم اسمع لہ فی علماء العراق ذکرا و کان یجانب الکلام و ینافر اھلہ حتی یودی و ذلک الی منافرۃ المتکلمین من اھل السنۃ (ابن فرحون ۔ دیباج المذھب ص ٢٤٢ ۔ قاھرہ ۔ ١٣٢٩ ھ)

(٨) داود الاصبہانی : ھو محمد بن داود بن علی بن خلف الاصبہانی

الظاهرى (٢٥٥ هـ / ٨٦٩م — ٢٩٧هـ/ ٩١٠م) ولد ببغداد و تحدبها للفتوى و توفى بها — من تصانيفه الوصول الى معرفة لاصول ، التقصى فى الفقه ، اختلاف صاحب الصحابه و غيرهم (ابن خلكان ، وفيات الاعيان ٣ : ٣٩٠ ، قاهره ، ١٩٤٨م)

(٩) سورة البقرة آية ٢٢٨ —

(١٠) ايضا آية ٤٢ —

(١١) سورة التوبة آية ٥ —

(١٢) سورة المائدة آية ٢ —

(١٣) سورة بنى اسرائيل — ٥٠

(١٤) سورة حم السجدة آية ٤٠ —

(١٥) سورة مريم آية ٣٨ —

(١٦) سورة البقرة آية ٤٣—

(١٧) سورة النور آية ٣٣ -

(١٨) ابو الحسن بن الصباب : فى نسخة ميدريد فى سائر المواضع " ابو الحسن بن الصاب " و لكن النسخة المطبوعة اثبتت الاسم كما ذكرنا ، و لم يوجد ترجمته ،

(١٩) ابو الفرج : هو عبد الله بن الطيب ، ابو الفرج : من علماء البغداد ، واسع العلم ، كثير التصنيف ، خبير بالفلسفه توفى فى فى ٤٣٥هـ / ١٠٤٣م (الذركلى ، الاعلام ٤: ٢٢٧ ،)

(٢٠) سورة الاعراف آية ١٢-

(٢١) سورة المدثر ٤٢ — ٤٤-

(٢٢) سورة البقر آية ٢٧٨

(٢٣) عن عبادة بن صامت ان رسول الله صلى الله عليه و سلم قال

لا تبيعوا الذهب بالذهب ... الخ

مشكوة المصابيح ص ٢٤٥ ، ١٩٣٢ھ

(٢٤) سورة البقر آية ٢٢١

(٢٥) (١) بيهقى ، السنن الكبرى ج ٥ : ٨٩ ، حيدرآباد دكن ، ١٣٥٠ھ

(٢) بخارى، الصحيح ج ١ : ١٩٦، دهلى ١٩٣٨ھ

(٢٦) سورة التوبة آية ٥ ــ

(٢٧) سورة الانبياء آية ٢٧ ــ

(٢٨) سورة الشعراء ــ ١٥

(٢٩) سيبويه ، الجزء الثانى ، صفحة ٢٠٢ ، قاهره ، ١٣١٦ ھ

(٣٠) سورة الاحزاب ، آية ٣٥

(٣١) سورة البقر ، آية ٢٢٨

(٣٢) ايضـــا = =

(٣٣) سورة الطلاق ،آية ١

(٣٤) البخارى ، الجزء الاول ص ١٩٦ ، دهلى ١٩٣٨ھ ،البيهقى ،

الجزء الرابع ص ٨٩ حيدر آباد دكن ، ١٣٥٠ھ

(٣٥) ايضـــا = = = =

(٣٦) مشكوة المصابيح صفحه ٢٤٤ ، دهلى ، ١٩٣٢ھ
(٣٧) ايضا ص ٥١-
(٣٨) ايضا صــ ٢٤٥

(٣٩) سورة النســاء ، آيه ٩٢

(٤٠) ديوان النابغه صفحات ٣٧ ، ٣٨ ، بيروت ، ١٩٥٣ ،

(٤١) سورة النور ، آيه ٤ —

(٤٢) سورة الانعام ، آية ١٤١ —

(٤٣) سورة البقرة ، آية ١١٠ —

(٤٤) سورة البقرة آية ١٨٣ —

(٤٥) سورة آل عمران ، آية ٩٧ —

(٤٦) سورة البقرة ، آية ٢٧٥ —

(٤٧) ابو محمد بن نصر : ابوبكر محمد بن عبد الله بن محمد بن نصر بن ورقا الاوردنى — امام اصحاب الشافعى فى عصره — اقام نيشابور مدة ، و توفى فى شهر ربيع الاول سنة خمس و ثمانين و ثمانين ثلثمائة ببخارا و دفن بكلاباز (ابن خلكان ، وفيات الاعيان ٣ ، : ٣٤٦ — ٥٧ ، قاهره ، ، ١٩٤٨ء)

(٣٨) سورة البقرة ، آية ٩ —

السنة

باب ١ : احكام أفعال النبى عليه السلام

فصل ١ : اقسام السنة

السنة الواردة عن النبى عليه السلام على ثلاثة اضرب :-

(١) اقوال و

(٢) افعال و

(٣) اقرار

و قد تقدم القول فى الاقوال و الكلام هاهنا فى الافعال

و هى تنقسم ⟨إلى⟩ قسمين :-

(١) (الاول) ما يفعل بيانا للمجمل

فحكمه حكم المجمل فى الوجوب او الندب ~~او الندب~~ او الاباحة –

(٢) و الثانى ما يفعله ابتداء ⟨وهو⟩ ايضا على ضربين :

(١) [احد] هما ان يكون فيه قربة

نحو ان يصلى او يصوم

فهذا قد اختلف اصحابنا فيه و ذهب ابن القصار و الابهرى

و غيرهما الى انها محمولة على الوجوب

و قال ابن المنتاب هى على الندب

و قال القاضى ابوبكر هى على الوقف[١]

و الاول اصح —

و الدليل على ذلك قوله تعالى ، و اتبعوه لعلكم تهتدون[٢]

و الامر يقتضى الوجوب و قوله ، فليحذر الذى يخالفون عن امره[٣] —

و الامر يقع (م / ٧ — ب) حقيقة على الفعل و القول و يدل م / ٧ — ب

على ذلك من جهة الاجماع رجوعهم الى قول عائشة رضى الله عنها لما

اختلفوا فى وجوب الغسل من التقاء الختانين فعلته انا و رسول الله

صلى الله عليه و سلم و فاغتسلنا[٤] و اخذ به جميع الصحابة و الزموه واجبا

(٢) و اما الفعل الثانى فهو مالا قربة فيه

نحو الاكل و الشرب و اللباس

فانه يدل على الاباحة

و قد ذهب بعض اصحابنا الى انه يدل على الندب نحو الاكل

باليمين ، فابتدأ التنعل باليمين و هذا غلط لان الندب هاهنا ليس

فى نفس الفعل و انما هو فى صفة الفعل و تلك قربة —

فصل ٢ : الاقرار النبى عليه السلام

و اما الاقرار ، " فان يفعل بحضرة النبى عليه السلام فعل

و لا ينكره "

فان ذلك يدل على جواز لانه عليه السلام لا يقر على منكر —

و ذلك نحو ما روى عن النبى عليه السلام انه سلم من

اثنتين فقال له ذو اليدين اقصرت الصلاة أم نسيت يارسول الله و لم

ينكر عليه صلى الله و سلم الكلام فى الصلاة ليفهم الامام (٥) فدل ذلك على جوازه و صحته —

فصـــل ٣ : (باب احكام) الاخبار النبى عليه السلام

الخبر هو الوصف للمخبر عنه

و هو ينقسم على قسمين :—

(١) صدق و

(٢) كذب —

فالصدق هو الوصف المخبر عنه على ما هو به —

و الكذب

هو الوصف المخبر عنه على ما ليس به

اذا ثبت ذلك فانه ينقسم ايضا الى قسمين :—

(١) تواترو (٢) آحاد —

(١) فالتواتر " ما وقع العلم بمخبره ضرورة من جهة المخبر عنه نحو الاخبار المتواتره عن وجود مكة و خراسان و مصر و ماهو (١) من محمد عليه السلام و نحو ورود القرآن —

(٢) و اما خبر الاحاد" بما قصر عن التواتر " .

و ذلك لا يقع به العلم و انما يغلب عن الظن بحق السامع له صحة لفظ المخبر به لان المخبر و ان كان ثقة يجوز عليه الغلط و السهو كالشاهد —

---

(١) فى ت : و ظهور محمد صلى الله عليه وسلم

و قال ابن خويز منداد يقع العلم بخبر الواحد

و الاول عليه جمهور الفقهاء —

فصل ٤ : المسند

اذا ثبت ذلك فانه (اى الخبر) على ضربين :

(١) مسند و

(٢) مرسل —

فالمسند ما اتصل اسناده

و هو يجب العمل به لأن الشرع ورد بذلك و انكر العمل به جماعة من اهل البدع —

و الدليل على ما قلناه انه لا يمتنع من جهة العقل ان يتعبدنا

م / ٨ — ١ الباري بالعمل بخبر من يغلب (م / ٨ — ١) على ظننا ثقة و امانته و ان لم يقع له العلم بصدقه كما تعبدنا بالعمل بشاهدة الشاهدين اذا غلب على ظننا ثقتهما و ان لم يقع لنا العلم بصدقهما و لذلك يرجع كثير من الشهود عن شهادته بعد قبولها و بعد انفاذ الحكم بها

[ومما يدل على ذلك ان النبي عليه السلام كان ينفذ امراءه إلى بلاد ليعلمون الناس ويأخذون منهم الصدقات] و مما يدل على ذلك اجماع الصحابة على وجوب العمل باخبار الاحاد -

(١) كرجوع عمر بن الخطاب من شرع بخبر عبد الرحمن بن عوف و اخذه خبزية المجوس(٦) بخبره و

(٢) رجوع الصحابة الى خبر عايشة فى الغسل من التقاء الختانين و(٧)

٣١) اخذ عثمان فى السكنى بخبر الفريعة بنت مالك(٨)

و غير ذلك مما لا يحصى كثرة –

فصل ٥ : المرسل

و اما المرسل فهو " ما انقطع اسناده " فاخل فيه يذكر بعض رواية

و لا خلاف انه لا يجب العمل به اذا كان المرسل غير متحذر .

ق / ٧ – ب

ق / ط ٧ – ب فاذا كان (٩) متحذرا لا يرسل الا عن الثقات كابرهيم [redacted] النخعى

و ابن المسيب فانه يجب العمل به عند مالك و ابى حنيفة

[سعيد]

و قال الشافعى لا يجب العمل به الا ان يكون مرسل ابن المسيب

خاصة فانى اعتبرت مراسله فوجدتها مسندة –

و الدليل على ما نقوله اتفاق الصدر الاول على [نقل] المرسل

و لوكان ذلك يبطل الحديث و لا خل الارسال فيمن(ب) ارسل و بلغنا

ذلك عن ابوهريرة و ابن عباس و البراء بن عازب و ابن عمر و عمر بن

الخطاب و غيرهم [من الصحابة] و اكثر التابعين و من بعدهم

قال محمد بن جرير الطبرى(ج) انكار المراسل بدعة ظهرت من بعد

المأتين

و ايضا فانه لا فرق بين مراسل سعيد بن المسيب و غيره اذا كان

المرسل ثقة متحذرا لان الشافعى ان كان لم ياخذ من مرسل سعيد

الا بما اتصل به اسناده فلم ياخذ بمرسله و انما اخذ بالمسند و لا معنى

لقوله اخذ بمرسل سعيد و ان كان اخذ بمراسله لانه قد وجد منها ما

(أ) النص العربى فى النسخة القديمة سقط منه شئ الى هذا اللفظ –
و يبتدأ من متحذرا لا يرسل ....

(ب) فى م ت: اتفاق الصدر الاول على نقل المرسل ولوكان ذلك يبطل الحديث لما اخل ....

(ج) فى ت : جرير فقط

ما يسند فهذا حكم غيره

و مما يدل على صحة العمل بالمرسل [اتفاقنا] ان التعديل يقر بقول الواحد " فلان ثقة " و لا يحتاج اذا كان من اهل العلم ان يبين معنى العداله عنده

فاذا علم من حاله انه لا يرسل الا عن ثقة او اخبر بذلك عن نفسه فارساله عنه بمنزلة ان يقول " حدثنى فلان و هو ثقة "(/م / ٨ ـ ب) م/٨ ـ ب

و قد اجمعنا على انه لو قال ذلك لوجب تقليده فى تعديله فكذلك اذا لرسل عنه ـ

فصـــل ٦ : رواية الخبر و ترك العمل به

(١) اذا روى الراوى الخبر و ترك العمل لم يمنع ذلك وجوب العمل به عند [اكثر اصحابنا] بعض اصحابنا و قال و اصحاب ابى حنيفة [ان ذلك] يبطل وجوب العمل به

و الدليل على ما نقوله ان خبر النبى عليه السلام اذا ورد وجب على الصحابي و غيره امتثاله الا ان يدل دليل على (ق/ ٨ ـ ا) نسخه

(٢) و ليس اذا تركه تارك بما يسقط وجوب العمل به عن من بلغــه

و لذلك استدللنا بخبر ابن عباس فى ان الامة اذا اعتقت تحت عبد تخيرت بخبر بريرة انها بيعت فاعتقت تحت عبد تخيرت(أ) و ان كان مذهب ابن عباس ان بيع الامة طلاقها(ب) (١)

(أ) فى م : ان بريرة بيعت فاعتقت تحت عبد تخيرت

(ب) سائر الفصل غير موجود فى "ت" ـ

فصل ٧ : رواية الخبر مع انكار المروى عنه

اذ روى الرواى الخبر فانكره المروى عنه فان ذلك على ضربين :

(١) احدهما ان يتوقف فيه و يشك

(٢) و الثانى ان يقطع على[ب] انه لم يحدثه[ج].

فاما ان شك المروى عنه فيه فقد ذهب جمهور اصحابنا و اصحاب ابى حنيفة و اصحاب الشافعى الى وجوب العمل به

و ذهب الكرخى الى انه لا يجب العمل به –

و الدليل على ما نقوله ان نسيانه لا يكون اكثر من موته و قد اجمعنا على ان موته لا يسقط العمل به فكذلك نسيانه –

و اما اذا قطع انه لم يحدث به فهو على ضربين ايضا :

(١) احدهما ان يقول "هو فى روايتى و لم احدث به الراوى" ،

فهذا لا يمنع وجوب العمل به من جهة المروى عنه

(٢) و اما اذا قال ، " لم اروه قط " فهذا لا يجوز الاحتجاج به جملة – لان المروى عنه ان كان كاذبا فقد بطل الخبر من جهة و ان كان صادقا فقد بطل ايضا لاخباره انه لم يروه –

فصل ٨ : رواية العدل الثبت

رواية العدل الثبت المشهور بالحفظ و الاتقان[د] الزيادة فى

(ب) فى ق : بانه (ج) فى ت : لم يخبره

(د) فى ق : الحافظ المتقين

الخبر على رواية غيره معمول بها خلافا لبعض اصحاب الحديث فى قولهم لا يقبل ذلك على الاطلاق(د)

و لبعض المتفقهة فى قولهم تقبل الزيادة من العدل على الاطلاق –

و الدليل على ما نقوله انه لو شهد شاهدان لرجل على غريمه بالف [درهم] او شهد شاهدان آخران بالف و خمسمائة لاخذ بالزيادة فكذلك الخبر

و لانه لو انفرد لقبل خبر لقبل منه فكذلك اذا انفرد به بنقل زيادة فى الخبر –

فصـــل ٩ : يجب العمل به بما نقل على وجه الاجازة

يجب العمل بما نقل على وجه الاجازة

و به قال عامة الفقها –

و قال اهل الظاهر لا يجوز العمل بالاجازة الا ان تكون مناولة او يكتب اليه المخبر ان الكتاب [الفلانى] و الديوان الفلانى بعـــدد

ق/ ٨ – ب (ق/ ٨ – ب) من ذلك من روايتى عن فلان فاروه ذلك عنى * و الدليل

م / ٩ – ا (م / ٩ – ا) على ما نقوله ان من كتب الى غيره * ان ديوان الموطأ او غيره من الكتاب المعلومة رويته عن [زيد] فاروه عنى اذا صح عندك لم يحتاج الى ثبات الكتاب [الموطأ] عنده الى نقل الثقة – ثم يحتاج فى تصحيح كتاب الموطأ و العلم بأنه مسائل لاصل المخبر له الى نقـــل الثقة ايضا فتحصل له الرواية بعد ثبات ذلك عنده من طريقين :–

(د) لا تقبل الزيادة من العدل

(الى اخبار ثقة بان هذا الكتاب رواه المخبر له عن فلان فلا يحتاج ان يصح ذلك) عنده ان يصح ذلك عنده و اذا قال له مشافهة " ما صح عندك من حديثى فاروه عنى " لم يحتج فى ذلك الا من طريق واحد ثم ثبت و تقرران فى النوع الاول يصح اجازته فبان تصح هاهنا اولى و اخرى ثم ثبت و تقرران فى النوع الاول يصح اجازته فبان تصح هاهنا اولى و اخرى [تم الجزء الاول يتلوه فى الثانى — على بركة الله و عونه سبحانه]

باب ٢ : ذكر الناسخ و المنسوخ

فصل ١ : تعريف النسخ

النسخ هو ازالة الحكم الثابت بالشرع المتقدم بشرع متاخر عنه [على وجه] لولاه (ا) لكان (ب) ثابتا (ج) —

و ذلك ان الناسخ و المنسوخ لابد ان يكونا حكمين شرعيين فاما الناقل عن حكم الاصل و الساقط بعد ثبوته و امتثال موجبه فانه لا يسمى نسخا —

فصل ٢ : النسخ من جهة النقص او الزيادة

اذا ثبت ذلك فاذا نقص بعض الجملة او شرط من شروطها فقد

(ا) اى لولا الخطاب الدال على ازالة الحكم
(ب) اى لكان الحكم الثابت بالخطاب المتقدم
(ج) اى مستمرا فى جميع الازمنة المستقبلة —

ذهب اكثر الفقهاء الى انه ليس بنسخ — و قال بعض الناس هو نسخ

و كذلك الزيادة فى النص — قال اصحاب ابى حنيفة هو نسخ

و قال اصحابنا و اصحاب الشافعى ليس بنسخ

و قال ابوبكر ان كان النقص من العبارة او الزيادة [فيها] بغير حكم المزيد فيه او المنقوص منه حتى يجعل ما لم تكن عبادة قايمة بنفسها عبادة ثابتة و قربة مستقلة او يجعل ما كان عبادة شرعية غير شرعية فهو نسخ

نحو ان يزاد فى الصلاة التى هى ركعتان ركعتان اخريان فهذا
ق/ ٩ — ا يكون نسخا لان الركعتين اوليين حينئذ لا تكون (ق/ ٩ — ا) صلاة شرعية و كذلك اذا ورد الامر بالصلاة الرباعية ان تصلى ركعتين فانه نسخ ايضا لان الاربع ركعات حينئذ لاتكون صلاة —

و اما اذا لم تغير الزيادة و لا النقصان حكم المزيد عليه و لا المنقوص منه فليس بنسخ

مثل ان يومر فى حد شارب الخمر باربعين ثم يومر [فيه]
م/ ٩ — ب بثمانيين فان هذه الزيادة لا تبطل (م/ ٩ — ب) حكم المزيد عليه لانه لو ضرب اربعين بعد الامر بالثمانين لاجزت عن الاربعين و يبنى عليها ان اراد ان يتم الثمانين، و الذى امر باربع ركعات فصلى ركعتين لا تجزيه ان يتم عليها ركعتين حتى يبتدئ اربع ركعات، و كذلك لو امر بجلد ثمانين [redacted] فى الخمر ثم نقص منها فانه لا يكون نسخا لجميع الحد و انما يكون نسخا للاربعين فقط .

فصــــل ٣ : النسخ لا يدخل فى الاخبار

ذهب جمهور الفقهاء الى ان نسخ لا يدخل فى الاخبار

و قالت طائفة يدخل النسخ فى الاخبار

و الصحيح من ذلك ان نفس الخبر لا يدخله النسخ ـ لان ذلك لا يكون نسخا و انما يكون كذبا لاكن ان ثبت بالخبر حكم من الاحكام جاز ان يدخله النسخ ـ

فصــــل ٤ : جواز نسخ العبادة بمثلها

يجوز نسخ العبادة بمثلها و بما هو اخف منها و اثقل

و عليه جمهور الفقها ـ

و منع قوم نسخ العبادة بما هو اثقل منها ـ

و الدليل على ما نقوله ان البارى تعالى قد اوجب على المكلفين ما يشق عليها [ايجابه] و حرم عليهم ما يشق [عليهم] تحريمه

و اذا كان ان يبتدى التعبد بما هو اثقل عليهم من حكم الاصل جاز ان ينسخ عنهم العبادة [بما هو اثقل عليهم منها] ـ

فصل ٥ : التــلاوة و حكمهــا

اذا وردت التلاوة متضمنة حكما واجبا علينا من تحريم او فرض او غير ذلك من العبادات ، فامرنا بتلاوتها ـ

فان فيها حكميــن : ـ

(١) احد هما ما تضمنه من العبادة ٠

(٢) و الثانى ما الزمناه من حفظها و تلاوتها ٠

و ذلك بمثابة (ق / ٩ ــ ب) ما لو تضمن(١) الخبر حكمين ق/ ٩ ــ ب

احدهما صوم و الاخر صلاة ٠

فاذا ثبت ذلك جاز نسخ الحكم و بقاء التلاوة و جاز نسخ التلاوة

و بقاء الحكم ٠

فاما نسخ الحكم و بقاء التلاوة فهو مثل نسخ حكم التخيير بين

الصوم او الفدية لمن اطاق الصوم و نسخ الوصية للوالدين و الاقربين

(و نسخ تحريم الصدقة عند مناجاة الرسول عليه السلام) ٠

و منع من ذلك الشافعى ــ

و الدليل على ذلك ان القران و الخبر المتواتر كلاهما شرع مقطوع

بصحته ــ و ماذا جاز [ان] ينسخ القران بالقران جاز ان ينسخ بالخبر

المتواتر ــ و مما يبين ذلك ان قوله تعالى عزوجل " الوصية للوالدين

و الاقربين (١١) " منسوخ بما روى عن (ق/ ١٠ ــ ا) النبى عليه ق/ ١٠ ــ ا

السلام انه قال ان الله تعالى قد اعطى كل ذى حق حقه فلا وصية

لوارث(١٢)

فصــــل ٨ : نسخ السنة بالقــــران

و يجوز عند جمهور الفقهاء نسخ السنة بالقران

و منع من ذلك الشافعى ــ

و الدليل على ذلك ما ورد من القران

(١) بصلاة الخوف بعد ان ثبت بالسنة تاخيرها (يوم الخندق) الى ان آمن و

(٢) نسخه التوجه الى بيت المقدس بقوله تعالى " فول وجهك

شطر المسجد الحرام [١٣]

(٣) و قوله تعالى " لا ترجعوهن الى الكفار [١٤] " بعد ان قرر النبى عليه السلام برد من جاء من المسلمين اليهم –

فصل ٩ : نسخ القران و الخبر المتواتر بخبر الاحاد [١]

يجوز نسخ القران و الخبر المتواتر بخبر الاحاد

و قد منعت ذلك طائفة –

و الدليل على ذلك ما ظهر من تحول اهل قبا الى الكعبة بخبر الواحد و قد كانوا يعلمون استقبال بيت المقدس من دين النبى عليه السلام ضرورة الا انه لا يجوز ذلك بعد زمن الرسول عليه السلام للاجماع على ذلك

فاما القياس فلا يصح النسخ به جملة

فصل ١٠ : الشريعة الماضية

ذهبت طائفة من اصحابنا و اصحاب ابى حنيفة و الشافعى [الى] ان شريعة من [كان] قبلنا لازمة لنا الا ما دل الدليل على نسخه ،

و قال القاضى ابوبكر و جماعة من اصحابنا بالمنع من ذلك

و الدليل على ما نقوله ،

(١) قوله تعالى اولئك الذين هد الله فبهداهم اقتده [١٥]

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(١) فى ق : فصل بنبينا عليه السلام

فامرنا باتباعهم

(٢) و قوله تعالى : " شرع لكم من الدين ما وصى به نوحا و الذى اوحينا اليك[١٦]..." الاية

(٣) و لا تتفرقوا فيه[١٧]

(٤) و ما روى عن النبى عليه السلام انه قال " من نام عن الصلاة او نسيها فليصليها اذا[١٨] ذكرها

(٥) فان الله تعالى يقول " اقم الصلاة لذكرى[١٩] و انما خوطب بذلك موسى عليه السلام فاخذ به [أ] نبينا عليه السلام

(أ) فى ق : تعلل بنبينا عليه السلام

حـــــواشـــــى

الســـــنة

(١) معنى الوقف ، فلا يحمل على الوجوب ولاعلى الندب الا بدليل

(٢) سوره الاعراف ، آيه ١٥٧

(٣) سورة النور ، آيه ٦٣ ،

(٤) مشكوة المصابيح ص ٤١ ، دهلى ، ١٣١٠ هـ

الفاظ الحديث : قالت قال رسول الله صلى الله عليه و سلم اذا جاوز ختان الختان وجب الغسل فعلته انا ورسول الله صلى الله عليه و سلم فاغتسلنا ـ

(٥) مشكوة المصابيح ص ٥٩٢ دهلى ، ١٩٣٢ ء

(٦) ايضا ، باب الجزيه ص ٣٥٣ ، دهلى ، ١٣١٠ هـ

و لم يكن عمر اخذ الجزية من المجوس حتى شهد عبد الرحمن بن عوف ان رسول الله صلى الله عليه و سلم اخذها من المجوس هجر ـ

(٧) ايضا ، ص ٤١

(٨) ايضا ، ص ٢٨٩ ، باب العده ـ

عن شدينة ابن كعب ان الفريعة بنت مالك بن سنان وهى اخت ابى سعيد الخدرى اخبرتها انها جاءت الى رسول الله صلى الله عليه و سلم تسئله ان ترجع الى اهلها فى بنى لا خدرة فان ذوجها خرج فى طلب اعبدله القوا فقتلوه قالت فاسئلت رسول الله الله صلى الله عليه و سلم ان ارجع الى اهلى فان ذوجى لم يتركن فى منزل يملكه و لا نفقه

فقالت قال رسول الله صلى الله عليه و سلم ، نعم ،فانصرفت حتى اذا كنت فالحجرة اوفى المسجد دعانى فقال امكثى فى بيتك حتى يبلغ الكتاب اجله قالت فاعتددت فيه اربعة اشهر و عشر -

(٩) ايضا ، ص ٢٨٦ ، دهلى ، ١٩٣٢ ء -

(١٠) ابوبكر الصير فى : هو محمد بن عبد الله ابوبكر الصيرفى (المتوفى ٩٤٢ ء/ ٣٣٠هـ) احد المتكلمين و من كبار الفقهاء الشافعيه - اخذ الفقه عن ابى العباس بن سريج - حكى ابوبكر القفال ، ان ابابكر الصيرفى كان اعلم الناس بالاصول بعد الشافعى - له كتب منها ، البيان فى دلائل الاعلام على اصول الاحكام فى اصول الفقه و كتاب الفرائض - و توفى يوم الخميس لثمان بقين من ربيع الاخر منه ٣٣٠ هـ (أ - ابن خلكان ، وفيات الاعيان ٣ ، : ٣٣٧ ، قاهره ، ١٩٤٨ع ١٢ - الزركلى ، الاعلام ٧١ : ٩٦ ، ١٣٧٥هـ/ ١٩٥٦هـ)

(١١) السنن ابوداود ، ٢ : ٤٠ (كتاب الوصايا) كانپوره ١٣٤٦هـ -

(١٣) سورة البقرة آية ، ١٤٩ -

(١٤) سورة الممتحنه آية ١٠ -

(١٥) سورة الانعام آية ، ١٠٦ -

(١٦) سورة الشورى آية ١٣ -

(١٧) ايضـــــا

(١٨) (١) البخارى ، ١ : ١٩٦ ، دهلى ، ١٩٣٨ ء -

(٢) البيهقى ، ٤ : ٨٩ ، حيدر آباد كن ، ١٣٥٠هـ

(١٩) سورة طه آية ، ١٤ -

الاجمـــــاع

فصـــل ١ : حجيـــة الاجمـــاع

اجماع الامة على حكم الحادثة دليل شرعى[1]

فيجب المصير الى ما اجمعت عليه و القطع بصحته خلافا للامامية —

و الدليل على ذلك :

ق/١٠ — ب (١) قوله تعالى " و من يشاقق الرسول(ق/١٠ — ب) من بعد ما

تبين له الهدى و يتبع غير سبيل المومنين —

(٢) نوله ما تولى و نصله جهنم و سائت مصيرا[2] "

فتواعد [الله] على اتباع غير سبيل المومنين فكان ذلك امرا باتباع

سبيلهم -[3]

فصـــل ٢ : ما يعرف به الاجمـــاع

فاذا ثبت ذلك فالامة على ضربين :—

(١) خاصة و

(٢) عامـــة .

فيجب اعتبار اقوال الخاصة و العامة فيما كلفت الخاصة و العامة معرفـــة الحكم فيه[1]

فاما ما يتفرد الحكام و الفقهاء بمعرفته من احكام الطلاق و النكاح و البيوع و العتق و التدبير و الكتابة و الجنايات و الرهون و غير ذلك من الاحكام التى لا علم للعامة بها ـ فلا اعتبار فيهما بخلاف العامة[ب] و بذلك قال جمهور الفقهاء

و قال القاضى ابوبكر يعتبر باقوال العامة فى ذلك كله

و الدليل على ما نقوله ان العامة يلزمهم اتباع العلماء فيما ذهبوا اليه ـ و لا يجوز لهم مخالفتهم فهم فى ذلك بمنزلة اهل العصر مع من تقدمهم بل حال اهل العصر الثانى افضل لانهم من اهل العلم و الاجتهاد ـ

ثم ثبت انه لا اعتبار باقوال اهل العصر الثانى مع اتفاق اهـــل العصر الاول فبان لا يعتبر باقوال العامة مع اتفاق العلماء اولى و احرى .

فصـــــل ٣ : انعقاد الاجماع باتفاق جميع العلماء

لا ينعقد الاجماع الا باتفاق جميع العلماء ـ

فان شذ منهم واحد[ج] لم ينعقد اجماع

و ذهب ابن خويز منداد الى ان الواحد و الاثنين لا يعتد بهم

و الدليل على ما نقوله قوله تعالى « و ما اختلفتم فيه من شيء فحكمه الى الله[٤] » ـــ و قد وجد اختلاف ـ

فصــــل ٤ : اجماع العلماء على حكم حادثة

اذا اجمع العلماء على حكم حادثة انعقد لا الاجماع و حرمت المخالفة و لا يعتبر في ذلك بانقراض العصر

و على هذا اكثر الفقهاء من اصحابنا و غيرهم

و قال ابو تمام ‹البصري› من اصحابنا (٥) و بعض اصحاب الشافعي :

لا ينعقد الاجماع الا بانقراض العصر

و الدليل على ذلك ان حجة الاجماع لا يخلو ان يثبت بالاجماع(ق/ ١١ ــ ق/ ١١ ــ أ

او بانقراض العصر او بهما ، و لا يجوز ان يثبت بانقراض العصر

لانه ليس بقول و لا حجة ، و لان ذلك يوجب ان يكون (م / ١١ ــ أ) م / ١١ ب

الاختلاف حجة مع انقراض العصر ، و لا يجوز ان يكون انقراض العصر و الاتفاق جميعا حجة ، لان كل واحد [منهما] بانفراده اذا لم يكن [الاخر] حجة فاضافته الى الاخر لا يصير حجة ــ فلم يبق الا ان يكون الاتفاق [حجة] و ذلك موجود مع بقاء العصر ــ

فصــــل ٥ : اجماع اهل كل عصر حجــة

اجماع اهل كل عصر حجة (٤)

هذا قول جماعة الفقهاء غير داود ابن علي الاصبهاني ، فانه قال اجماع عصر الصحابة حجة دون اجماع المومنين في ساير الاعصار ــ

و دليلنا قوله تعالى ، و من يشاقق الرسول من بعد ما تبين له الهدى ... الاية (٧)

و اذا ثبت ان غير الصحابة يشاركوا الصحابة في هذا الاسم وجب

ان يثبت لهم هذا الحكم الا ان يدل الدليل على اختصاص الصحابة به

فصـــل ٦ : اجماع اهل المدينة[ا]

فاما اجماع اهل المدينة فقد اطلق اصحابنا هذا اللفظ ـ

و انما عول[ب] مالك رحمة الله و محقق اصحابه على الاحتجاج بذلك فيما طريقه النقـل

كمسئلة الاذان و الصاع و ترك الجهـر ببسم الله الرحمن الرحيم فى الفريضة و غير ذلك من المسائل التى طريقها النقل

و اتصل العمل بها فى المدينة على وجه لا يخفى مثله ، و نقل نقلا متواترا ، فانما خصصت المدينة بهذه الحجة دون [غيرهامن] ساير البلاد لانها كانت موضع النبوة و مستقر الخلافة و الصحابة بعده صلى الله عليه و سلم ـ و لو تحيا [مثل] ذلك فى ساير البلاد لكان حكمهـا[ج] ذلك ـ

فصـــل ٧ : اقوال الصحابى او الامام اذا انتشر و لم يعلم له مخالف فانه اجماع

اذا قال الصحابى [اوالامام] قولا او حكم بحكم و ظهـــر ذلك و انتشر انتشارا لا يخفى مثله و لم يعلم له مخالف ، و لا سمع له منكر فانه اجماع و حجة قاطعة

(ا) فى م : لفظ فصل غائب
(ب) فى م : اما قول مالك
(ج) فى م : حكمها ايضا ذلك

و به قال جمهور اصحابنا و اصحاب ابى حنيفة و الشافعى ـ

و قال القاضى ابوبكر

لا يكون اجماعا حتى ينقل قول كل واحد من الصحابة فى ذلك

و به قال داود ـ

و الدليل على ما نقوله ان العادة جارية بانه لا يجوز ان يسمع العدد الكثير و الجم الغفير الذى يصح عليهم التواطؤ و المتساعد لا قولا يعتقدون خطاءه و بطلانه ثم يمسك جميعهم عن انكاره و اظهار خلافه ، بل اكثرهم يسرع الى ذلك و يسابق اليه ،

فاذا ظهر قول و اشتهر و انتشر و بلغ اقاصى الارض و لم يعلم له مخالف ، علم ان ذلك السكوت رضى منهم به و اقرار عليه لما جرت به العادة

و لولا ذلك لم يصح اجماع و لا تثبت به حجة الا بعد ان يروى الاتفاق على حكم الحادثة عن كل واحد من اهل العلم فى عصر الاجماع و لبطل الاجماع

و بطل الاحتجاج به لاستحالة وجود ذلك فى مسئلة من مسائل (م / ١١ ـ ب) الاصول او الفروع كما لا يعلم اليوم اتفاق علماء عصرنا فى جميع الافاق(ب) على حكم حادثه بل اكثر العلماء لا يعلم بوجود هم فى العالم ـ م / ١١ ـ ب

فصـــــل ٨ : اختلاف الصحابة على قولـــين

اذا اختلف الصحابة فى حكم [حادثة] على قولين لم يجـــز

(ب) فى ق : كلهم

احداث قول ثالث ـ

و هذا قول كافة اصحابنا و اصحاب الشافعى ـ

و قال داود يجوز احداث قول ثالث

و الدليل على ما نقوله انهم اذا [أ] اجتمعوا على القولين ،

فقد اجتمعوا على ان ما عدا القولين خطأ

و انما اختلفوا فى تعيين الحق فى احدهما لم يختلفوا ان ما

عداهما خطأ فمن قال بغيرهما فقد صوب ما اجتمعت الصحابة على انه خطأ ـ

فصـــل ٩ : انعقاد الاجماع من جهة القياس

يصلح ان ينعقد الاجماع على حكم من جهة القياس فى قول كافة

الفقهاء

و ذهب ابن خويز منداد [ب] الى ان ذلك لا يصح وجوده فلو وجوده

فلو وجد لكان دليلا .

و قال داود لا يصح ذلك و هذا بنى عنده على ان القيـــاس

ليس بدليل و سياتى كلام على ذلك ان (ق/ ١٢ ـ ا) شاء الله تعالى [ج]

(أ) فى م : انما
(ب) فى ت : ابن الخراد
(ج) فى م : و سياتى القياس فيه

حـــــواشـــــى

الاجـــــاع

(١) و قال ابو الاسحاق الشيرازى من امام الشافعيه فى عهد ابى الوليد الباجى ، " الاجماع حجة فى جميع الاحكام الشرعيه كالعبادات و المعاملات و احكام الدماء و الفروج و غير ذلك من الحلال و الحرام و الفتاوى و الاحكام

(الشيرازى ، اللمع ص ٢٠٤ ، قاهره ، ١٣٢٥)

(٢) سورة النساء آية ١١٥ ـ

(٣) الاجماع حجة من جهة اقوال النبى صلى الله عليه و سلم ايضا ـ قوله عليه السلام

(١) لا تجتمع امتى على الخطاء ـ و روى

(٢) لا تجتمع امتى على الضلالة و قوله عليه السلام

(٣) من فارق الجماعة و لو قيد شبر فقد خلع رقبة الاسلام من عنقــه و نهى عن الشذوذ و قال :ـ

(٤) من شذ شذ فى النار ـ فهذا الاحاديث دل على وجوب العمل بالاجماع (ايضا ، ص ٢٠٢)

(٤) سورة الشورى آية ١٠

(٥) ابو تمـــام : لم يوجد ترجمته لان المولف لا يستعمل اسمه فى سائر الكتاب سوى الكنيـــة ،

(٦) قال الشيرازى . " لانه اتفاق من علماء العصر على حكم الحادثة فاشبهه الصحابة " ـ و ذكر قوله النبى عليه السلام " لا يخلو عصر من قائم لله عزوجل بحجة ـ (اللمع ص ٢١٠ ، قاهره ١٣٢٥)

انما الرواية فى الصحيحين ، " لا تزال طائفة من امتى ظاهرين على الحق لا يضرهم خلاف من خالفهم و يوخذ منه انهم موجودون فى كل اعصار و لا تختص بعصر الصحابة

(٧) سورة النساء آية ١١٥ ـ

الجـــز الثـــانى

معقـــول الاصـــــــــل

معقـــول الاصـــل

باب ١ : اقســام الخطـــاب

قد ذكرنا ان الادلة الشرع على ثلثة اضرب :-
(١) اصل و (٢) معقول اصل و (٣) استصحاب حال الاصل
و قد تقد القــول[١] فى الاصل و الكلام هاهنا فى معقول الاصل -
و هو ينقسم على اربعة اقسام[ب] :

(١) لحن الخطاب و

(٢) فحوى الخطاب و

(٣) الحصر و

(٤) معنى الخطاب

فصـــل ١ : لحـــن الخطـــــاب

فاما لحن الخطاب فهو " الضمير الذى لا يتم الكلام الا به "
و هو ما خوذ من اللحن - و هو ما يبدأ فى عرض الكلام من معنـــاه -

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(١) فى م : وقد مر الكلام
(ب) فى ق،م : قسمين

نحو قوله تعالى " و من كان منكم مريضا او على سفر فعدة من ايام اخر[1]. معناه فافطر فعدة من ايام اخر

فهذه حجة يجب المصير اليها و العمل بها و قد يلحق بذلك ما ليس منه و هو ادعاء ضمير يتم الكلام دونه ـ نحو استدلال لنا على ان العظم محلة الحياة لقوله تعالى ، قال من يحيى العظام و هى رميم[2]

فيقول الحنفي المراد بذلك من يحيى اصحاب العظام و مثل هذا لا يجوز فيه تقدير مضمر الا بدليل لاستقلال الكلام دونه ـ

فصـــل ٢ : فحوى الخطاب

و اما الضرب الثانى و هو فحوى الخطاب " فهو ما يفهم من نفس الخطاب من قصد المتكلم بعرف اللغة ،

نحو قوله تعالى ، " و لا تقل لهما اف و لا تنهرهما"[3] فهذا يفهم منه من جهة اللغة المنع من الضرب و الشتم و ما يجرى مجرى النص

م / ١٢ ـ ا على ذلك فى وجوب العمل به و المصير اليه (م/ ١٢ ـ أ)

فصل ٣ : الحصـــــر

م / ١٢ ـ ا (م/ ١٢ ـ أ) و اما الضرب الثالث و هو الحصر فله لفظ واحـــد و هو " انما "

و ذلك نحو قوله عليه السلام " انما الولاء لمن اعتق ."[4] ـ فظاهر هذا اللفظ يدل على ان غير المعتق لا ولاء له ـ

و قدير در مثل هذا القول فى تحقيق المنصوص عليه لا لنفى ما سواه

ـ نحسو قولك " انما الكريم يوسف ، صلوات الله عليه " " و " انما

١١ــب الشجاع عنترة " و لم يرد نفى الكرم عن غير يوسف و لا نفى (ق/ ١١ــب) الشجاعة عن غير عنترة ـ و انما اراد اثبات ذلك ليوسف عليه السلام و ان يجعل له فى الكرم مزية على غيره الا ان الظاهر ما بدأنا به اولا ـ فلا يعدل عنه الا بدليل ـ

فصل ٤ : دليل الخطاب

و مما يلحق بذلك و يقرب منه عند كثير من الناس دليل الخطاب .

و هــــو :

ان يعلق الحكم على معنى ما (١) لم يكن به ـ و ذلك المعنى من ذلك الجنس

نحو قوله عليه السلام : فى سايمة الغنم : (٥) الزكاة ، فيقتضــى ذلك نفى الزكاة فى غير السايمة

فهذا النوع من الاستدلال يسمى عند اهل النظر دليل الخطــاب ـ

و قد ذهب الى القول به جماعة من اصحابنا و اصحاب الشافعى [و منع منه جماعة من اصحابنا و اصحاب الشافعى] و ابى حنيفة و هو الصحيح لان تعليق الحكم بصفة فى بعض الجنس يفيد تعليق ذلك الحكم

---

(١) فى النسخة ق ، على من

(٥) الكلمة الغائبه فى م ، " تلك "

بما وجدت فيه تلك الصفة خاصة ـ و يبقى الباقى فى حكم المسكوت عنه ه طلب دليل حكمه فى الشرع ـ

يدل على ذلك ما روى البخارى عن الشيبانى عن عبد الله ابـــن ابى اوفى نهى النبى عليه السلام عن الجر الاخضر قلت أيشرب فى الابيض قال لا(٦) ـ فوجه الدليل منه بانه نص على الجر الاخضر ـ ثم ذكـــر ان حكم الابيض حكمه ـ و هو من اهل اللسان ـ فلو جاز التعليق بدليل الخطاب لوجب ان يحكم له بالمخالفة و ان لا يتعلق الحكم بالجر الاخضر خاصــة ـ

باب ٢ : احكام القيـــاس

فصـــل ١ : معنى القياس

و اما الضرب الرابع من معقول الاصل فهو معنى الخطاب و هو القياس وحده ـ

ـ القياس ,, حمل احد المعلومين على الاخر فى اثبات حكم او اسقاطه بامر جامع بينهما ,, ـ

و هو دليل شرعى عند جميع العلماء ـ

و قال داود يجوز التعبد به من جهة العقل الا ان الشرع منع منــه ـ

ق/ ١٣ ـ ١ و الدليل على ما ذهب اليه جماعة اهل العلم (ق/ ١٣ ـ ١) قـوله ,, عزوجل فاعتبروا يا اولى الابصار ,, ـ

م / ١٢ ــ ب و الاعتبار فى اللغة هو" تمثيل الشى بالشى"(م / ٢ لــ ب) واجراء حكمه عليه و لذلك يقال عبرت الدنانير و الدراهم اى قال يستها بمقاديرها من الاوزان و يقال لمفسر الرويا " معبر " و عبرت الرويا اى حكمت لها بحكم يماثلها و يشابهها و قستها بما يشاكلها و عبرت عن كلام فلان اذا جئت بالفاظ تطابق معانيه و تماثلها و تقايس بها ــ

فصـــل ٢ : اثبات القياس و ما جعل حجة فيه(٤)

(١) و مما يدل على ذلك قوله تعالى :

" ما فرطنا فى الكتاب من شى" ــ

و نحن نجد احكاما كثيرة ليس لها ذكر فى القران و لا فى سنة النبى عليه السلام ، مثل رجل له دينار وقع فى محبرة لغيره فلم يستطيـــع على اخراجه ــ و مثل ثوب ابيض لرجل وقع فى قدر لصباغ فكمل صبغه و حسن و غير ذلك

و لا يجوز ان يراد بالاية انه نص على حكم كل حادثة فى القران و انما اراد به انه نص فيه على بعض الاحكام ، و احال (القرآن) على ساير الادلة فيه ، فكان ذلك بمنزلة ان ينص فى القران على جميعهـــاــ

فمن الادلة التى احال على الاحكام فيها القياس لاننا نجد احكاما كثيرة لا طريق الى اثباتها الا بالقياس و الرأى ــ كالاحكام التى ذكرناها و ما شاكلها(٢) مما يدل على ذلك من جهة السنة :

(١) قوله عليه السلام لعمر حين سأله عن القبلة للصايم ــ ارأيت

لو تمضمضت أكان عليك من جناح؟ قال لا - قال ففيم اذا؟

(٢) و قوله للخثعمية تعم ارايت لو كان على ابيك دين اكنت قاضية؟ قالت نعم - قال فدين الله احق (١٥) ان يقضى

(٣) قوله ايضا للذى انكرلون ولده هل لك من ابل؟ قال نعم - قال فما الوانها؟ قال حمر - قال فهل بها من اورق؟ قال نعم - قال أين انى ترى ذلك؟ قال عرق نزعه - قال فلعل هذا عرق نزعه (١١)

و غير ذلك مما لا يحصى كثرة -

ق / ١٣ - ب (٣) و مما يدل على ذلك علمنا (ق/ ١٣ - ب) ان الصحابة رضوان الله عليهم اختلفوا فى مسائل كثيرة جرت بينهم فيها مناظرات مشهورة و مراجعات كثيرة كاختلافهم فى توريث الجدة مع الاخوة - و اختلافهم فى الحرام و العول و الظهار و العدة

فلا يخلو ذلك من ثلاثة احوال

(١) اما ان يكون فى هذه الاحكام المختلف فيها نص لا يحتمل التاويل او - ظاهر يحتمل التاويل او

(٣) يرد ذكر بحكمها جملة

و يستحيل ان يكون فيها نص يحتمل التاويل و لانه لو كان لسارع المخالف اليه الموافق له فانقطع الخلاف و ثبت الاجماع على الحق

/ ١٣ - ا و يستحيل (م / ١٣ - ا) ان يكون فيها نص فيذهب على جميعهم - لان ذلك اجماع منهم على الخطاء و لا يجوز هذا - و لو جاز ذلك لجاز ايضا ان يذهب عليهم شرايع و صلوات و صيام و عبادات قد نص عليها صاحب الشرع و هذا باطل باتفاق من المسلمين -

و يستحيل ان يكون فى ذلك دليل لا يحتمل التاويل – لانه لو كان ذلك لوجب بمستقر العادة ان ينزع كل مخالف الى الظاهر الذى تعلق به و بين احتجاجه منه و لا يحتج بالراى و القياس – لان المستدل و المحتج انما يحتج بما ثبت عنده به الحكم – و لا يعدل عند المناظرة و قصد اثبات الحق الى ماليس بدليل و لا حجة عنده و لا عند خصمه –

و لما رأينا كل واحد منهم احتج فى ذلك بالراى و القياس دون منكر و لا مخالف علمنا اجماعهم على القول بصحة القياس و الراى –

(٤) و مما يدل على ذلك اجماع الصحابة على احكام كثيرة من جهة القياس و الراى –

كاجماعهم :

(١) على امامة ابى بكر بالقياس و الراى

(٢) و اجماعهم على امامة عثمان و غير ذلك مما اجمعوا عليه –

(٣) و من ذلك خبر عمر بن الخطاب رضى الله عنه انه خرج الى الشام باصحاب النبى عليه السلام ، فلما بلغ سرغ بلغه ان الوباء وقع بالشام بها ، فاستشار المهاجرين الاولين فاختلفوا عليه – فمنهم من قال له أرى ق/١٤ـ١ الا تفر من قدر الله – و منهم من قال له ، لا تقدم ببقية اصحاب ق/١٤ـ١ رسول الله صلى الله عليه و سلم على الوباء – ثم دعا الانصار ، فاختلفوا كاختلاف المهاجرين قبلهم – ثم دعا من حضر من مشيخة قريش من مهاجرة الفتح ، فلم يختلفوا عليه و امروه بالرجوع

و لم يكن منهم احد ذكر فى ذلك آية من كتاب الله و لا حديثا عن رسول الله صلى الله عليه و سلم فاشار كل واحد منهم برأيه و ما

اداه اجتهاده اليه و لم ينكر عليه احد فعله فقال عمر رضى الله عنه انى مصبح على ظهر فاصبحوا عليه

فقال له ابو عبيدة بن الجراح ، أفرارا من قدر الله ؟ فقال له عمر لو غيرك قالها ايا ابا عبيدة نعم نفر من قدر الله الى قدر الله ـ أرايت لو ان لرجل ابلا فى واد له عدوتان احداهما خصبة و الاخرى جدبة ؟ ١٣ ـ ب
أليس ان رعا الجدبة رعاها بقدر الله و ان رعا (م/١٣ ـ ب) الخصبة رعاها بقدر الله ؟

فاعترض عليه ابو عبيدة بالرائى و جاوبه عمر بالراى و لم يحتج احد هما فى ذلك بكتاب الله و لا بسنة رسول الله صلى الله عليه و سلم و لا اجماع ـ

ثم شاعت هذه القصة و ذاعت ، و لم يكن من المسلمين من انكر على احد منهم القول بالراى

و ما اعلم ان مسئلة يدعا الاجماع فيها اثبت فى حكم الاجماع من هذه المسئلة ـ

فصـــل ٣ : حد القياس

اذا ثبت ان القياس دليل شرعى فانه يصح ان تثبت به الحدود و الكفارات و الابدال

و قال ابو حنيفه لا يجوز ان يثبت شئ من ذلك بالقياس

و ما قاله ليس بصحيح لان الاية عامة فى الامر بالاعتبار و لا يجوز ان يخص الا بدليل ـ

فصـــل : ٤ العلة الواقفـــه

العلة واقفة عندنا صحيحة ـ

نحو علة منع التفاضل فى الدنانير و الدراهم انها اصول الاثمـان و قيم المتلفات ـ

و قال اصحاب ابى حنيفة ليست بصحيحة ـ

و الدليل على ما نقوله ان القياس امارة شرعية فجاز ان يكون خاصة و عامة كالخبر ـ

فصـــل ٥ : الاستحســـان

و ذكر محمد بن خويز منداد ان معنى الاستحسان الذى ذهب اليه بعض اصحاب مالك رحمه الله و هو " القول باقوى الدليلين "

مثل (ق / ١٤ ـ ب) تخصيص بيع العرايا من بيع الرطب بالتمر للسنة الواردة فى ذلك (١٣) لانه لو لم يرد شرع فى اباحة بيع العرايا بخرصها تمرا لما جاز لانه من بيع الرطب بالتمر ـ ١٤ ـ ب

و هذا الذى ذهب اليه هو الدليل و انما سماه استحسانا على معنى المواضعة و لا يمتنع ذلك فى حق عرف اصل كل صناعة ـ

و الاستحسان الذى يختلف اهل الاصول فى اثباته هو " اختيار القول من غيره دليل و لا تقليد " ـ

و ذهب بعض البصريين من اصحاب مالك و اصحاب ابى حنيفة الى اثباته

و منع منه شيوخنا العراقيون و الشافعى

و الدليل على ما نقوله ان هذه معارضة للقياس بغير دليل فوجب ان يبطل اصل ذلك اذا عورض بمجرد الهوى —

فصـــل ٦ : الذرائع

مذهب مالك رحمه الله المنع من الزرايع و هى :

" المسئلة التى ظاهرها الا باحة و يتوصل بها الى فعل المحظور "

و ذلك نحو ان تبيع السلعة بماية الى اجل ثم تشتريها بخمسين نقدا يتوصل بذلك الى بيع خمسين مثقالا نقدا بماية الى اجل

و اباح الزرايع ابو حنيفة و الشافعى (م/ ١٤ _ ١) ~~بيع xxxxxxxxxxxx~~ ١٤ _ ١

و الدليل على ما نقوله :

(١) قوله تعالى عزوجل ، " وسئلهم القرية التى كانت حاضرة البحر اذ يعدون فى السبت اذ تا(١٤)تيهم " —

فوجه الدليل من هذه الاية انه تعالى حرم عليهم الاصطياد يوم السبت و اباحه فى ساير الايام فكانوا يحصرون عليها اذا جاءت يوم السبت و يسدون عليها المسالك و يقولون انا منعنا من الاطياد يوم السبت و انما نفعل الاصطياد فى ساير الايام و (ق/ ١٥ _ ١) هذه صورة الذرايع

(٢) و مما يدل على ذلك ايضا قوله تعالى ، " يا ايها الذين آمنوا لا تقولوا راعنا و قولوا انظرنا واسمعوا(١٥) " _

فوجه الدليل من هذا انه منع المومنين من ان يقولوا راعنا لما كان اليهود يتوصلون بذلك الى سب النبى عليه السلام فمنع من ذلك المومنين

و ان كانوا لا يقصدون به ما منع من اجله

(٤) و ايضاًفان ذلك اجماع الصحابة و ذلك ان عمر بن الخطاب رضى الله عنه قال " يا ايها الناس ان النبى عليه السلام قبض و لم يفسر لنا الربا فاتركوا الربا (١٤) و الريبة " –

(٥) و قول عايشة رضى الله عنها لما اشترى زيد بن ارقم من ام ولده جارية بثمان مائة الى العطاء و باعها منها بمائة نقدا ابلغوا زيدا انه قد ابطل جهاده مع رسول الله صلى الله عليه و سلم ان لم (١٧) يتب "

(٤) و قال ابن عباس لما سئل عن بيع الطعام قبل ان يستوفى درهم بدراهم و الطعام (١٨) مرجئا

فصل ٧ : الاستدلال بالعكس

يصح الاستدلال بالعكس

و قال ابو حامد الاسفرائينى (٩) لا يجوز –

و الدليل على قولنا ان المعلل اذا قال لا يحل الشعر الروح ، لانه لو حله لما جاز اخذه من الحيوان حال الحياة مع السلامة و علمنا ان الروح لا تحله كالريش فهذا الاستدلال صحيح لانه لو حلت الحياة الشعر و جاز اخذه من الحيوان حال الحياة لان نقضت العلة

فصل ٨ : الاستدلال بالقرائن

يجوز الاستدلال بالقرائن عند اكثر اصحابنا

و قال ابو محمد [٢٥] بن نصر يجوز ذلك و به قال [٢٦] المزني،

و الدليل على على ما نقوله ان كل واحد من اللفظين المقترنين له حكم نفسه و يصح ان يفرد بحكم دون ما قارنه و لا يجوز أن يجمع بينهما الا بدليل كما لو وردا مفترقين .

حــواشــى

معقــول الاصـــــل

(١) سورة البقرة آية ١٨٤

(٢) سورة ليسين آية ٧٨

(٣) سورة بنى اسرائيل ٢٣

(٤) هذا الحديث روى عن عائشة من بالفاظ الآتية :

انها (اى عائشة) ارادت ان تشترى جارية تعتقها ـ فقال اهلها لم نبكـمها على ان ولاءها لنا فذكرت ذلك لرسول الله صلى الله عليه و سلم فقال لا يمنعك ذلك فانما لاولاء لمن اعتق (مسلم الصحيح جزء الثانى حديث ١١٤١ ، قاهره ١٣٧٤ هـ / ١٦٥٥ء)

(٥) على المتقى ، كنز العمال ٥ : ٥١٨ حديث # ٢٧٩١ ، حيدر آباد دكن ١٣٧٤/١٩٥٤ع

(٦) ايضا ، ٥ : ٣٠١ ، حديث ٢٠٣٨

الفاظ الحديث : عن سليمان الشيبانى عن عبد الله بن ابى اوفى قال سمعت رسول الله صلى الله عليه و سلم ينهى عن الجر الاخضر يعنى النبيذ فى الجر قال و الابيض قال لا ادرى ـ

(٧) ـ سورة الحشر آية ٢

(٨) ـ الدارمى ، السنن ، ٢ : ١٢ ، كتاب الصوم ، دمشق ، ١٣٤٩هـ

(٩) ـ سورة الانعام آية ٣٨ ـ

(١٠) الدارمى ، السنن ٢ : ٤٣ ، كتاب المناسك ـ

(١١) ابن ماجه ، السنن ، لكهنو ، ١٣١٥ هـ

و رد الحديث في سنن ابن ماجه من هذه الالفاظ : عن ابو هريرة قال جاء رجل من بني فزاره الى رسول الله صلى الله عليه و سلم فقال يا رسول الله ان امرأتي ولدت غلاما اسود فقال رسول الله صلى الله عليه و سلم هل لك من ابل قال نعم قال فما الوانها قال حمر قال هل فيها من اورق قال ان فيها اورق قال فانى اتاها ذلك قال عسى عرق نزعها قال و هذا لعل عرقا نزعه —

(١٢) مسلم ، الصحيح ، ٤ : ١٧٤٠ — ٤١ ، كتاب السلام (٩٨) ، قاهره ، ١٣٧٥هـ/ ١٩٥٥م

(١٣) سورة الاعراف آية ١٦٣

(١٤) سورة البقرة آية ١٠٤ —

(١٥) ابن ماجه ، السنن ، ص ١٦٥ ، التجارات ، لكهنو ، ١٣١٥هـ
عن عمر بن الخطاب قال ان آخر ما نزلت آية الربا و ان رسول الله صلى الله عليه قبض و لم يفسرها لنا فدعوا الربا والريبة —

(١٦) ابن اثير الجزرى ، جامع الاصول ، ١ : ٤٧٨ ، قاهرة ، ١٣٦٨هـ/ ١٩٤٩—

(١٧) ابوداود ، السنن ، ٢ : ١٣٨ ، كتاب البيوع ، كانپور ، ١٣٤٦هـ —
... قال قلت لابن عباس لم قال الاترى انهم يتباعون بالذهب و الطعام مكرجى —

(١٨) ابوحامد الاسفرائينى : هو الشيخ ابو حامد احمد بن ابى طاهر طاهر محمد بن احمد الاسفرائينى (٣٤٤هـ/ ٩٥٥م) اصله اسفراين

من بلدة خراسان بنواحى نيشابور – قدم بغداد فى سنة ٣٦٣هـ و درس الفقه بها الى ان توفى ليلة السبت لاحدى عشرة بقيت من الشوال سنة ٤٠٦هـ ببغداد – و الف كتب ، منها ، اصول الفقه ، و مختصر فى الفقه سماه " الرونق " و غيرهما

(ابن خلكان ، وفيات الاعيان ، ١ : ٥٥–٦ ، قاهره ، ١٣٤٧هـ/ ١٩٤٨ع (٢) الزركلى ، الاعلام ، ١ : ٢٠٣ –

(١٩) ابو محمد بن نصر : هو ابوبكر محمد بن عبد الله بن محمد بن نصر بن ورتا الاودنى . امام اصحاب الشافعى فى عصره – توفى فى شهر ربيع الاول سنة ٣٨٥هـ ببخارا – و دفن بكلا باذ –

(ابن خلكان ، وفيات الاعيان ، ٣ : ٣٤٦ ، قاهره ، ١٩٤٨ء)

(٢٠) المزنى : هو اسماعيل بن يحيى بن اسماعيل بن عمرو بن اسحاق ، ابو ابراهيم المزنى (١٧٥هـ/ ٧٩١ء – ٢٦٤ء / ٨٧٨ء) من امام الشافعيين – منسوب الى مزينة بنت كلب ، و هى قبيلته مشهودة ، كان زاهدا عالما مجتهد اقوى الحجة من اهل مصر – صنف كتبا كثيرة – منها ، الجامع الصغير ، الجامع الكبير ، مختصر المختصر ، المنثور ، المسائل المعتبرة ، الترغيب فى العلم ، الوثائق و غير ذلك – و توفى فى شهر رمضان فى سنة ٢٦٤هـ بمصر و دفن بالقرب من تربة الامام الشافعى رضى الله عنه بالقرافة الصغرى –

(أ – ابن خلكان ، وفيات الاعيان ١ : ١٩٦ ، أأ – الزركلى ، الاعلام ، ١ : ٣٢٧)

الجــــــزء الثالـــــــث

استصحـــاب الحـــــــــال

استصحـــاب الحـــال

باب ١ : حكم استصحـــاب الحال

فصـــل ١ : اقســـام استصحـــاب الحال

قد ذكرنا ان ادلة الشرع ثلاثة اضرب : ـ

(١) اصل و

(٢) معقول الاصل و

(٣) استصحاب الحال

/ ١٤ ـ ب و قد(م / ١٤ ـ ب) مر الكلام فى الاصل و معقول الاصل و الكلام هاهنا فى استصحاب الحال ـ

و هو على ضربين :ـ

(١) احدهما استصحاب حال العقل ـ

/ ١٥ ـ ب و ذلك ه " اذا(ق/ ١٥ ـ ب) ادعا فى المسئلة احد الخصمين حكما شرعيا و ادعا الاخر البقاء على حكم العقل " ـ

و ذلك مثل ان يسئل المالكى عن وجوب الوتر ـ فيقول الاصل براءة الذمة و طريق استعمالها الشرع[١] ـ

فمن ادعا شرعا يوجب ذلك فعليه الدليل ــ

و هذه طريقة صحيحة من الاستدلال ــ

(٢) و الثانى استصحاب حال الاجماع ــ

و ذلك مثل استدلال

(٣) داود على ان ام الولد يجوز بيعها

(٤) لاننا قد اجمعنا على جواز بيعها قبل الحمل ، فمن ادعا المنع من ذلك بعد الحمل فعليه الدليل

(٥) و هذا غير صحيح من الاستدلال ، لان الاجماع لا يتناول موضع الخلاف و انما يتناول موضع الاتفاق ــ و ما كان حجة فلا يصح الاحتجاج به (الا) فى موضع الذى لايتناوله[1] كالفاظ صاحب الشرع اذا تناولت موضعا خاصا لم يجز الاحتجاج بها فى الموضع الذى لا تتناوله ــ

فصــــل ٢ : الاباحة و التحريم بالعقل

اذا ثبت ذلك فليس فى العقل حظر و لا اباحة و انما تثبت الاباحة او التحريم بالشرع ــ فالبارى تعالى يحلل ما يشاء و يحرم ما يشاء ــ

هذا قول جمهور اصحابنا

و قال ابوبكر الابهرى الاشياء فى العقل على الحظر ــ

و قال ابو الفرج المالكى الاشياء فى العقل على الاباحة ــ

و الدليل على ما نقوله انه لو كان العقل يوجب اباحة شئ من

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(١) فى ، م ــ يوجد فيه .

هذه الاعيان او حظره لاستحال ان ينقله الشرع عما يقتضيه فى العقـــل لاستحالة ورود الشرع بما ينافى العقل كما يستحيل ان يرد بنفي ان الاثنين اكثر من الواحد ـ

فصـــل ٣ : وجب الدليل على من ادعا

من ادعا نفى حكم وجب عليه الدليل كما يجب على من اثبته ـ

و قال داود لا دليل على النافى ـ

و الدليل على ذلك قوله تعالى ؛ " و قالوا لن يدخل الجنة الا من كان هودا او نصارى تلك امانيهم • قل هاتوا برهانكم ان كنتم صادقين " ـ

فصـــل ٤ : اوصاف المجتهد

صفة المجتهد

(١) ان يكون عارفا (ق/ ١٦ ـ ١) بموضع الادلة بمواضعها من جهة العقـــــــل ١٦/ ١ـ

(٢) و يكون عالما بطريق الايجاب و بطريق الموضعة فى اللغـــة و الشرع

(٣) و يكون عالما باصول الديانات و اصول الفقه

(٤) عالما باحكام الخطاب من العموم و الاوامر والنواهى و المفسر م//ه(٣٠)/١٥=١) و المجمل و النص و النسخ و حقيقة الاجماع ١٥/ ١ـ

(٥) عالما باحكام الكتاب

(٦) عالما بالسنة و الاثار و الاخبار و طرقها و التميز بيـــن

صحيحها و سنقيمها

(٧) عالما باقوال الفقهاء من الصحابة و التابعين و من بعدهم وبما اجمعوا عليه و بما اختلفوا فيه

(٨) عالما من النحو و العربية بما يفهم به معانى كلام العرب

(٩) و يكون مع ذلك مامونا فى دينه موثوقا به فى فضله

فاذا كملت له هذه الخصال كان من اهل الاجتهاد وجاز لـــه ان يفتى و جاز للعامى تقليده فيما يفتيه فيه ـ

فصـــل ١ : الترجيح فى اخبار الاحاد

الترجيح فى اخبار الاحاد * يراد لقوة غلبة الظن باحد الخبرين عند تعارضهما ـ

و الدليل على صحة ذلك اجماع السلف على تقديم بعض اخبار الرواة على اخبار سايرهم ممن يظن به الحفـظ و الضبط و الاهتمام بالحادثة

فصـــل ٢ : الترجيح فى الاسـناد

اذا ثبت ذلك فالترجيح يقع فى الاخبار التى تتعارض و لا يمكن الجمع بينهما و لا يعرف المتاخر منهما فيحمل على انه ناسخ فى موضعين :

(١) احدهما الاسناد و

(٢) الثانى المتن ـ

(١) فاما الترجيح فى الاسناد فعلى اوجه :ـ

(١) الاول ان يكون احد الخبرين مرويا فى قصة مشهورة متداولة

عند اهل النقل و يكون المعارض له عاريا من ذلك فيقدم الخبر المروى فى قصة مشهورة

لان النفوس الى قبوله اسكن و الظن فى صحته اغلب ـ

(٢) و الثانى ان يكون الراوى احد الخبرين احفظ و اضبط و راوى الذى يعارضه دون ذلك و ان كانا جميعا يحتج بقولهما فيقدم خبر احفظهما (ق/ ١٦ ـ ب) و اثبتهما ـ ١٦/ ـ ب

لان النفس اسكن الى روايته و اوثق بحفظه ـ

(٣) و الثالث ان يكون رواة احد الخبرين اكثر من رواة الخبر[١] الاخر فيقدم الخبر الكثير الرواة

لان السهو و الغلط ابعد عن الجماعة و اقربه الى الواحد ـ

(٤) و الرابع ان يقول راوى احد الخبرين سمعت رسول الله صلى الله عليه و سلم و الاخر يقول كتبه النبى صلى الله عليه و سلم إلى فيقدم خبر من سمع النبى عليه السلام ـ

لان السماع من العالم اقوى من الاخذ من كتابه الوارد ـ

(٥) الخامس ان يكون احد الخبرين متفقا على رفعه الى رسول الله صلى الله عليه و سلم و الاخر مختلفا فيه فيقدم المتفق عليه

لانه ابعد من الخطاء و السهو ـ

(٦) و السادس ان يكون[٢] احد الخبرين (م/ ١٥ ـ ب) ١٥/ ـ ب

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(١) الكلمة الغائبه فى م ـ ٠٠ الخبر ٠٠ـ

(٢) على الهامش فى ، ق ٠

مختلف الرواية عنه اثبات الحكم و نفيه و راوى الخبر الاخر لا يختلف الرواية عنه و انما يقدم احد الامرين فيقدم رواية من لم يختلف منه

لان ذلك دليل على حفظ الرواة عنه وشدة اهتمامهم بحفظ ما رواه فكان اولى —

(٧) السابع ان يكون راوى احد الخبرين هو صاحب القصة و الملتبس بها و راوى الخبر الاخر اجنبى فيقدم خبر صاحب القصة

لانه اعلم بظاهرها و باطنها و اشد اهتماما بحفظ حكمها —

(٨) الثامن اطباق اهل المدينة على العمل يوجب احد الخبرين، فيكون اولى من خبر من يخالف عمل اهل المدينة

لانها موضع الرسالة و مجتمع الصحابة فلا يتصل العمل بها الا باصح الرواية —

(٩) التاسع ان يكون احد الروايتين اشد تقصّيا للحديث و احسن نسقا له من الاخر فيقدم حديثه عليه —

لان ذلك يدل على شدة اهتمام له[1] بحكمه و بحفظ جميع اموره —

(١٠) العاشر ان يكون احد الاسنادين سالما من الاضطراب و الاخر مضطربا فيكون السالم اولى

لان ذلك دليل على اتفاق رواته و حفظ جملته —

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(١) فى م ، الفتياله

(١١) الحادى عشر ان يكون احد الخبرين يوافق ظاهر الكتاب

/ ١٧ ـ ا و الاخر يخالفه فيكون الوافق لظاهر الكتاب اولى ـ (ق/ ١٧ ـ ا)

فصل ٣ : ترجيحات المتون

قد مضى الكلام فى الترجيح من جهة الاسناد ـ و الكلام هاهنا فى الترجيح من جهة المتن

و ذلك على اوجه :-

(١) احدها ان يسلم احد المتنين من الاضطراب و الاختلاف و يكون متن الحديث المعارض به مضطربا مختلفا فيه فيكون السالم من الاضطراب اولى ـ

لان ذلك دليل على الحفظ و الاتقان ـ

(٢) الثانى ان يكون ما تضمنه احد الخبرين من الحكم منطوقا به و الاخر محتملا له ـ فيقدم ما نطق بحكمه

لان الغرض فيه البين و المقصود فيه اجلى ـ

(٣) الثالث ان يكون احد الخبرين مستقلا بنفسه و الاخر غير مستقلا بنفسه فيكون مستقلا بنفسه اولى ـ

لان المستقل بنفسه متيقن المراد به و غير المستقل بنفسه ٠٠ لايتيقن المراد به الا بعد نظر و استدلال ـ

(٤) الرابع ان يستعمل الخبران فى موضع الخلاف فيكون اولى من استعمال احدهما و اطراح الاخر ـ

الخراج احدهما. الخامس ان يكون احد العمومين تنازع فيه في تخصيصه
والآخر متفقا على تخصيصه فيكون المختلف في عمومه اولى من المتفق على تخصيصه اولى.
السادس ان يكون احد الخبرين لا يفتقر الى بيان الحكم والآخر يفتقر الى بيان
الحكم فيكون ما لا يفتقر الى بيان اولى لانه ابعد من الاحتمال. السابع ان يكون
احد الخبرين مبينا الحكم والآخر [illegible] فيه [illegible] اولى. الثامن
ان يكون احدهما ورد على سبب والآخر على غير سبب فيكون ما ورد على
غير سبب اولى من الوارد على سبب لان من جاز قصره على الآخر دل على انه مقصور
على سببه. التاسع ان يكون احد الخبرين قد قضي به على الآخر في موضع
من المواضع فيكون اولى منه في سائر المواضع. العاشر ان يكون احد
الخبرين واردا بالفاظ متغايرة وعبارات مختلفة فيكون اولى مما روي
من اخبار الآحاد بلفظ واحد لانه ابعد من الغلط والسهو والتحريف.
الحادي عشر ان يكون احد الخبرين ينفي النقص عن اصحاب رسول الله صلى
الله عليه وسلم والآخر يضيفه اليهم فيكون النافي اولى لانه اشبه بعظمهم ودينهم
وما وصفهم الله به واثنى عليهم. **باب ترجيحات العلل** قد مضى
الكلام في ترجيح الاخبار والكلام ها هنا في ترجيح العلل وذلك العلل
انه قد تتعارض عند المناظر علتان ويتردد الفرع بين اصلين يصح حمله
على احدهما بعلة مستنبطة منه فيحتاج الناظر الى ترجيح احدى العلتين ويصح حمله على الآخر بعلة مستنبطة منه
على الاخرى وذلك على احد عشر وجها. احدها ان تكون احدى العلتين منصوصا
عليها والاخرى غير منصوص عليها فيقدم المنصوص عليها لان نص صاحب
الشرع دليل على صحتها. الثاني ان تكون احدى العلتين لا تعود على اصلها بالتخصيص
والثانية تعود على اصلها بالتخصيص فالتي لا تعود على اصلها بالتخصيص اولى لان
التعلق بالعموم اولى من استثنائها كان بعضها. الثالث ان تكون احدى العلتين موافقة
للفظ الاصل والاخرى مخالفة فيقدم الموافقة لان الاصل شاهد للفظها.
الرابع ان تكون احدى العلتين مطردة منعكسة والاخرى مطردة غير منعكسة

Escorial MS, fol. 16a.

١٦ـا لان فى ذلك اطراح احد الدليلين و استعمالهما اولى (م/ ١٦ ـ ا) من اطراح احدهما ـ

(٥) الخامس ان يكون احد العمومين متنازعا فى تخصيصه و الاخر متفقا على تخصيصه ـ فيكون متيقن بالعموم مالم يجمع على تخصيصه اولى ـ

(٦) السادس[1] ان يكون احد الخبرين لا يقصد به بيان الحكم و الاخر يقصد به بيان الحكم ـ فيكون ما قصد به بيان الحكم اولى ـ لانه ابعد من الاحتمال ـ

(٧) السابع ان يكون احد الخبرين موثرا فى الحكم و الاخر غير موثر فيه فيكون الموثر اولى ـ

(٨) الثامن ان يكون احدهما ورد على سبب و الاخر على غير سبب ـ فيقدم ما ورد على غير سبب على الوارد على سبب لان معارضته الخبر الاخر يدل على انه مقصور على سببه ـ

(٩) التاسع ان يكون احد الخبرين قد قضى به على الاخر فى موضع الجمع[1] من المواضع فيكون اولى منه فى ساير المواضع ـ

(١٥) العاشر ان يكون احد المعنيين واردا بالفاظ متغايرة و عبارات مختلفة فيكون اولى مما روى من اخبار الاحاد بلفظ واحد لانه ابعد من الغلط و السهو و التحريف ـ

---

(١) الكلمة الغائبة فى م ـ ٠٠ الجمع ٠٠ ـ

١٧/ ـ ب (١١) الحادى عشر ان يكون الخبرين (ق/ ١٧ ـ ب) ينفى النقص عن اصحاب رسول الله صلى الله عليه و سلم و الاخر يضيفه اليهم فيكون الثانى اولى لانه اشبه بفضلهم و دينهم و ما وصفهم الله به و اثنى عليهم ـ

فصـــل ٩ : باب ترجيحـــات المعـــانى

قد مضى الكلام فى ترجيح الاخبار ـ و الكلام هاهنا فى ترجيحات المعانى (العلل) ـ و ذلك " انه قد يتعارض قياسان فى حكم حادثـة و يتردد الفرع بين اصلين " ـ يصح حمله على احدهما بعلة مستنبطة منه و يصح حمله على الثانى بعلة مستنبطة منه ـ فيحتاج الناظر الى ترجيح احدى العلتين على الاخر ـ

و ذلك على احد عشر ضربا :ـ

(١) احدها ان تكون احد العلتين منصوصا عليها و الاخرى غير منصوص عليها فيقدم المنصوص عليها

لان نص صاحب الشرع دليل على صحتها ـ

(٢) الثانى ان تكون احدى العلتين لا تعود الى[1] اصلها بالتخصيص و الثانية تعود على اصلها بالتخصيص فالتى لا تعود علـــى

---

(١) فى م ه ط على

اصلها بالتخصيص فالتى لا تعود على اصلها بالتخصيص اولى ـ

لان التعليق بالعموم اولى استنباطا او نطقا ـ

(٣) الثالث ان تكون احدى العلتين موافقة للفظ الاصل و الاخرى مخالفة له[٢] فتقدم الموافقة ـ

لان الاصل شاهد بلفظها ـ

(٤) الرابع ان تكون احد العلتين مطردة منعكسة و الاخرى مطردة غير منعكسة (م / ١٦ ـ ب) فتقدم المنعكسة ـ ١٦ ـ ب

لان العلة اذا اطردت و انعكست غلب على الظن[٣] تعلق الحكم بها لوجود بها و عدم بعدمها ـ

(٥) الخامس ان تكون احدى العلتين تشهد لها اصول كثيرة و الاخرى لا تشهد لها الا اصل واحد ـ فما تشهد له اصول كثيرة اولى

لان غلبة الظن انما تحصل بشهادة الاصول و كلما كثر ما تشهد بها من الاصول غلب على الظن صحتها ـ

(٦) السادس ان يكون احد القياسين رد الفرع الى اصل من جنسه و الاخر رد الفرع الى اصل من غير جنسه ـ فيكون قياس من رد الفرع الى جنسه اولى ـ

لان القياس الشيئ على جنسه اولى من قياسه على مخالفه ـ

(٧) السابع ان احدى العلتين موافقة والاخرى متعدية فالموافقة اولى ـ

(٨) الثامن ان تكون احداهما [illegible] فروعها والاخرى [illegible] فتكون العامة اولى ـ

(٢) غير موجود فى ق

(٣) غير موجود فى ق ـ ٠٠ غلب على الظن

(٩) التاسع ان تكون احدى العلتين عامة والاخرى خاصة لها فتكون العامة اولى لأن كثرة الفروع تجرى مجرى شهادة الاصول

(١٠) العاشر ان تكون احدى العلتين منتزعه من اصول منصوص عليها و الاخرى منتزعة من اصل لم ينص عليه – فيكون المنتزعة من اصل منصوص عليه اولى –

(١١) الحادى عشر ان تكون احدى العلتين اقل اوصافا و الاخرى كثيرة الاوصاف فتقدم القليلة الاوصاف –

لانها اعم فروعا و لان كل وصف يحتاج فى اثباته[1] الى ضرب من الاجتهاد و كل ما استغنى الدليل عن كثرة فى الاجتهاد كان اولى و الله اعلم .

كملت الاشاره لأبى الوليد الباجى فى اصول الفقه بحمد الله و حسن عونه –

و ذلك فى يوم السابع من رمضان المعظم عام اثنين و تسعين و سبعماية على يد الفقير الى الله تعالى الحسن بن مسعود الحاجى المتناوى غفر الله له و لوالديه و المسلمين امين و الصلاة و التسليم على سيدنا محمد و اله و صحبه و سلم تسليما كثيرا الى يوم الدين و رضى الله تعالى عن الصحابة اجمعين –

---

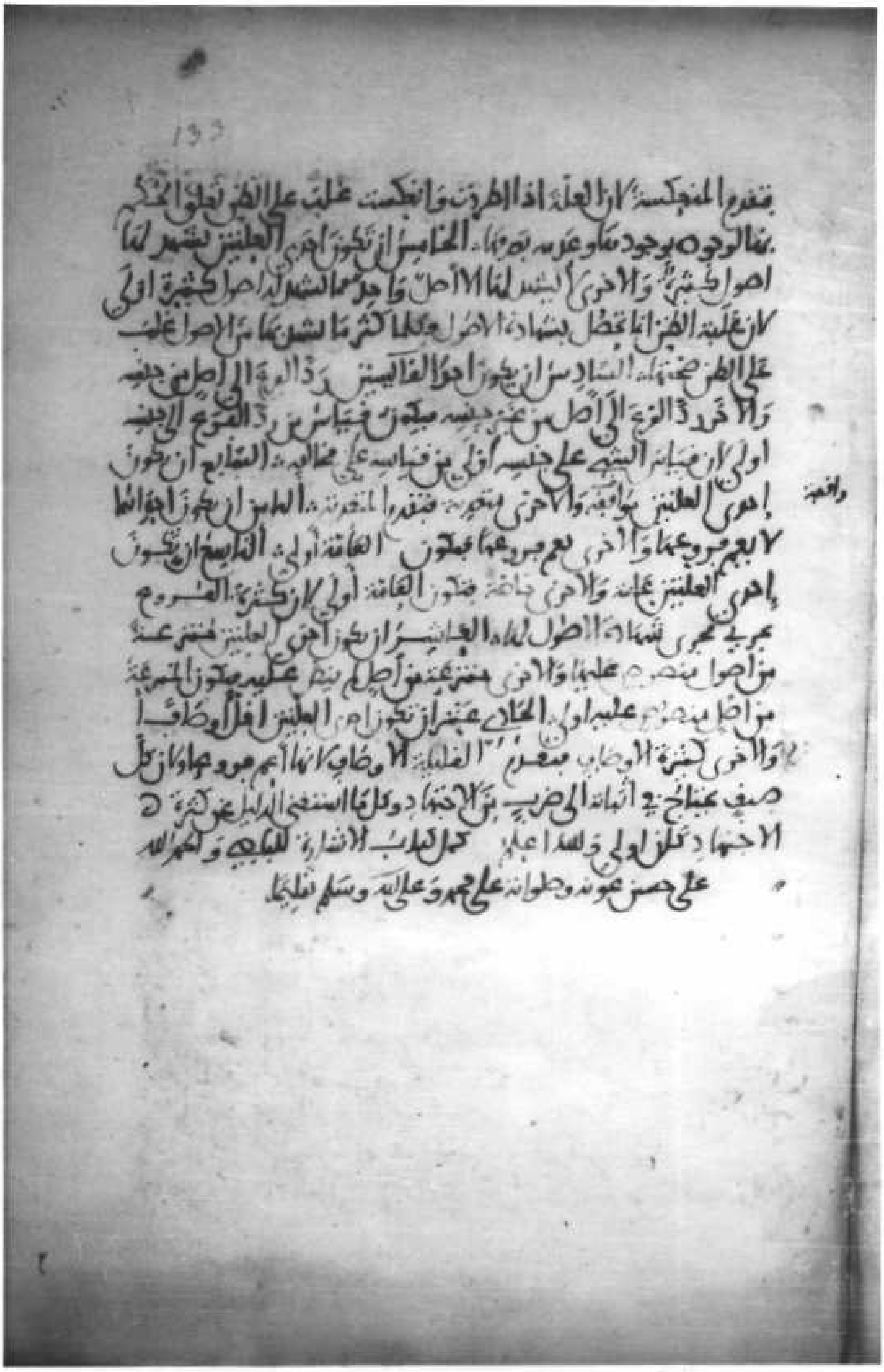
(١) فى النسخة ق ، اشارته

حواشي

استصحاب الحال

(١) استصحاب حال العقل : فهو الرجوع الى براءة الذمة في الاصل و ذلك طريق يفزع اليه المجتهد عند عدم ادلة الشرع ــ و لا ينتقل عنها الا بدليل شرعي ينقله عنه فان وجد دليلا من ادلة الشرع انتقل عنه سواء كان الدليل نطقا أو مفهوما او نصا او ظاهرا ...

(الشيرازي ، اللمع ، ٢٨٢ ــ ٣ ، قاهره ، ١٣٢٥هـ)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بمفهوم المنعكسة لان العلة اذا اطردت وانعكست غلب على الظن تعلق الحكم
بها لوجوده بوجودها وعدمه بعدمها. الخامس ان تكون احدى العلتين تشهد لها
اصول كثيرة والاخرى ليس لها الا اصل واحد فما تشهد له اصول كثيرة اولى
لان غلبة الظن انما تحصل بشهادة الاصول فكلما كثر ما تشهد لها من الاصول غلب
على الظن صحتها. السادس ان يكون احد القياسين رد الفرع الى اصل من جنسه
والاخر رد الفرع الى اصل من غير جنسه فيكون قياس رد الفرع الى جنسه
اولى لان قياس الشيء على جنسه اولى من قياسه على مخالفه. السابع ان تكون
احدى العلتين واقفة والاخرى متعدية فتقدم المتعدية. الثامن ان تكون احداهما
لا يعم فروعها والاخرى تعم فروعها فتكون العامة اولى. التاسع ان تكون
احدى العلتين عامة والاخرى خاصة فتكون العامة اولى لان كثرة الفروع
تجري مجرى شهادة الاصول لها. العاشر ان تكون احدى العلتين منتزعة
من اصل منصوص عليه والاخرى منتزعة من اصل لم ينص عليه فتكون المنتزعة
من اصل منصوص عليه اولى. الحادي عشر ان تكون احدى العلتين اقل اوصافا
والاخرى كثيرة الاوصاف فتقدم القليلة الاوصاف لانها اعم وجودا ولان كل
صنف يحتاج في اثباته الى ضرب من الاجتهاد وكلما استغنى الدليل عن كثرة
الاجتهاد كان اولى والله اعلم. كمل كتاب الاشارة للباجي والحمد لله
على حسن عونه وصلواته على محمد وعلى آله وسلم تسليما

The ending folio of "Al-Isharah fi usul al-Fiqh". Escorial MS, Madrid, Spain, fol. 16b.

AL-ISHĀRAH FĪ UṢŪL AL-FIQH

i.e.

A GUIDE TO THE PRINCIPLES OF MUSLIM JURISPRUDENCE

BY

QĀḌĪ ABŪ AL-WALĪD AL-BĀJĪ AL-ANDALUSĪ

(403 A.H/1012 A.D. - 474 A.H/1082 A.D.)

EDITED AND, TRANSLATED WITH INTRODUCTION AND NOTES

BY

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TABLE OF TRANSLITERATION

ا	ب b	پ p
ت t	ث th	ج j
چ ch	ح ḥ	خ kh
د d	ذ dh	ر r
ز z	س s	ش sh
ص ṣ	ض ḍ	ط ṭ
ظ ẓ	ع '	غ gh
ف f	ق q	ک k
گ g	ل l	م m
ن n	ه h	و w
ی ے y		

VOWELS

ـَ a	آ ـَا ā	ـَو aw
ـُ u	ـُو ū	ـَی ay
ـِ i	ـِی ī	

I

INTRODUCTION

(i) The life of Abū al-Walīd al-Bājī.

(ii) A Survey of Muslim Jurisprudence.

(iii) The manuscript.

A - THE AUTHOR

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I- BIRTH AND ANCESTORY OF AL-BĀJĪ

BIRTH:

Abū al-Walīd Sulaymān ibn Khalf ibn Sa'd ibn Ayyūb ibn Wārith al-Tujībī was born in the year 403 A.H./ 1012 A.D.

Ibn Bashkuwāl (494/1100-578/1182), an early biographer on al-Bājī, narrates two statements about the exact date of his birth. The first statement is that of Abū 'Alī al-Ghassānī, who reports directly from al-Bājī and says that "he (al-Bājī) was born in Dhī al-Qa'dah 403 A.H.(1) The second is the letter of Qāḍī Muḥammad Ibn Abū 'al-Khayr who says that Abū al-Walīd al-Bājī was born on Tuesday in the middle of Dhī-al-Qa'dah 403 A.H.(2)

All the biographers of the later period have followed Ibn Bashkuwāl.

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(1) Ibn Bashkuwāl, K. al-Ṣilah, Cairo, 1374/1955 Vol.I: pp.198-9;
قال ابو على الغسانى سمعت ابا الوليد يقول مولدى فى ذى القعده سنة
ثلاث و اربع مئة

(2) Ibid.

B I R T H   P L A C E :

The birth-place of al-Bājī is the city of Bedajoz or Batliyūs (3) — an old Roman city (Pax Augusta) in the province of Wester Spain, where al-Tujīb and its sister tribes were settled in great number. He is however, generally known as al-Bājī, because, as al-Maqqarī says:

واصله من بطليوس و انتقل جده الى باجه قرب اشبيليه

"Al-Bājī originally belongs to Bedajoz, but his grandfather migrated to Bājah near Seville." (4)

The statement indicates that Abū al-Walīd was born in Bedajoz and migrated to Beja with his family members in his infancy. The Tujibites of Bedajoz had near relations at Beja.

Al-Zirkilī, therefore, appears to have mistaken in his opinion that Abū al-Walīd was born in Beja. (5)

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(3) Ibid; Ibn Khallikān, Wafayāt al-Ayān, Cairo, 1367/1948, Vol; II p.142; Ibn Farḥūn, Dībāj al-Mudhdhahab, Cairo, 1351 A.H, P. 122.

(4) Al-Maqqarī , Nafḥ al-Ṭīb, Cairo, 1302 A.H, Vol I p.358.

(5) Zirkili, al-Alam , Cairo, 1378/1959, Vol, III, p.186.

Beja or al-Bājah was conquered by Mūsā in 93 A.H, probably between March and May 711 A.D. It was very famous for its tan-yards and manufactures of cotton goods; the territory abounded in silver mines. It is now a city located about 95 miles in south eastern side from Portuguiese capital Lisbon or Lashbūnah.(6)

ORIGIN OF HIS TRIBE:

Al-Bājī's tribe, al-Tujīb, took its name from a lady, tujīb, wife of Ashras ibn al-Sikkūn ibn Ashras ibn Kindah, the grandfather of the tribe. Kindah, a branch of Kahlān who descended from the "Qaḥṭān," deriving their origin from Qaḥṭān(7) ibn Sinā ibn Yaghjaj ibn ya'rib ibn Qaḥṭān. The Principal stock of Tujib tribe Qaḥṭanites, according to some geneologists like Ibn Ḥazm, were the descendants of Nūḥ. To some others like al-Bukhārī, they were the sons of Ismāīl.(8) Al-Kindah, the principal stock of the Tujibites is well known in the history of the Arabs.

The ancestors of the Kindites settled in Yaman and Haḍramawt. In course of time they spread all over the central parts of the Arabian Peninsula and established

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(6) 'Abd Allāh 'Annān, Athār al-Andalusiyyah al-Bāqiyah, Cairo, 1375/1956, pp.223-27; Inayatullah Moulawī, Andalus Ka Tārīkhī Gughrāfiyah, Hyderabad(Deccan), 1345/1927.

(7) Al-Maqqarī, Nafh al-Tīb, Cairo, 1302 A.H, Vol.I p.139; قال ابو علی الغسانی سمعت اباالولید یقول مولدی فی ذی القعده سنة ثلاث و اربع مئة .

(8) Ibid.

Arab States before Islam.

Kindah State was owned by Kindah Tribe who were the principle stock of Tujībites, the tribe of Abū al-Walīd al-Bājī.

there Kingdom. This Kingdom (of the Tujibites ancestors) later on became a powerful dynasty known as "Kindah state", extending its boundaries to Najd on the north Yaman on the south, 'Amman on the East and Hijaz on the west. (9)

The Kindites were great conquarors and builders of cities. Their dominion in Yaman and other parts of Arabia continued down to the seventh century of the Christian Era. (10) They were the only rulers who received the title of Malik, "King", in the Arabian Peninsula. (11)

ISLAM IN THE TUJIB TRIBE:

The principal stock of the Tujib Tribe, al-Qahtan, like the other ancient Arab tribes believed in a planetary astral system in which the cult of the Moon-god prevailed. The Moon-god was known as Sin, Wadd (love or lover), Almaquh (the health giving god) and 'Amm (paternal uncle) etc, in these tribes.

Under the Himyarite Kingdom Judaism spread in the Yeman and Najran and in course of time some Qahtani tribes accepted the religion of Musa. (12)

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(9) Hitti, P.K, History of the Arabs, London, 1960, p.84-85; See also map.

(10) Amir Ali, A short History of the Saracens, London, 1955, p.3.

(11) Hitti, P.K, History of the Arabs, p.85.

(12) Ibid, p. 60-2.

The first Christian mission was sent by the Roman Emperor in 356 A.D and landed on the soil of South Arabia. This mission was headed by a theologian, Theophilus, and followed by several missionaries. Some Qahtanites, like some of their opponent Arab tribes, thus, accepted Christianity as their religion.(13)

At the advent of Islam, the Qaḥṭānī tribes of the Yemen, including the Tujibites, believed in the old planetary astrāl system and Judaism. But a large number of these tribes adhered to Christianity. When the massege of Islam spread in every corner of the Arabian Peninsula, people from different parts began to visit Madīnah to hear the teaching of Islam directly from the Prophet. Some Qahtanites of the Yemen also went to Madīnah and met Muḥammad, the Messenger of Allāh (may peace be upon him). Among them al-Ash'ath ibn Qays, ibn Ma'dī-Karab ibn Mu'āwiyah al-kindī, an amīr of Marbū' (Ḥadramawt) also visited Madīnah with his seven friends. Al-Ju'dī (d. 586 A.H.) in his *Ṭabaqāt* says that he married 'Umm Furwah, the sister of the first Caliph, Abū Bakr.(14)

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(13) *Ibid*, p.62.

(14) Al-Ju'dī, *Ṭabaqāt al-Fuqahā' al-Yaman*, Cairo, 1957, p.11; the statement of al-Ju'dī reads:
و تزج الاشعث بن قيس اخت ابى بكر الصديق رضى الله عنه و اسمها
ام فروه و اولهم على عرسها وليمته المشهوره

As al-Qaḥṭānī and ʿAbd al-Qays were also among those Yemenites who accepted Islam. The Holy Prophet had given a letter of "political protection" to these Yemenites, as mentioned by al-Bulādhurī in his work, Futūḥ al-Buldān, (the Conquest of the Cities).(15) He (the Prophet) also wrote a letter to the political authorities of the Yemen inviting them to accept Islam.(16) This letter, al-Bulādhurī has mentioned in these words:-

بسم الله الرحمن الرحيم

من محمد النبى رسول الله

الى (١) الحارث بن عبد كلال و (٢) شرح

بن كلال و الى (٣) النعمان قيل ذى رعين ((٤) معافى ((٥) همدان

اما بعد : فان الله قد هداكم بهدايته ان اصلحتم و اطعتم الله

و رسوله اقمتم الصلواة و اتيتم الزكاة و اعطيتم من المغانم خمس الله و

و سهم النبى و صفيه و ما كتب الله على المومنين من الصدقة من العقار عشر ما سقت

العين و سقت السماء و ما سقى بالغرب نصف العشر ـ

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(15) Al-Bulādhurī, Futūḥ al-Buldān, Cairo, 1350/1932, pp. 79,80 ; he says:

لما بلغ اهل اليمن ظهور رسول الله صلى الله عليه و سلم و علو حقه اتته وفودهم فكتب لهم كتاب باقرارهم على ما اسلموا عليه من اموالهم وارضيهم و ركازهم .

(16) Ibid, p. 82.

On the request of the delegation of al-Qaḥṭān (the principal stock of al-Tujīb) and other Yemenite tribes, the Holy Prophet deputed some of his Companions (Ṣaḥābah) to preach Islamic tenets in these tribes, Ibn Sa'd, in his Ṭabaqāt has given the biographies of twenty-nine such Companions who went to Yaman played an important part in spreading Islam and settled there.[17] He also mentions the name of thirty-four Muhaddithīn (upto 4th ṭabaqah) who taught the Qur'ān and Sunnah to the Tujibites and their fellow tribes.[18]

SETTLEMENT OF TUJIBITIES IN SPAIN

After the conquest of Spain Arab tribes left the abodes of their forefathers for settling in the Spanish peninsula. This migration, as Dr. Munis has rightly observed, was "a search for better place and dignity".[19] (المتكاسا للمكانة و المنزلة) Among these settlers both the Qaḥṭanites and the Adnanites were great in number. The Qaḥṭanites, says al-Maqqarī, were about fifty - two tribes and thus, constituted the over-whelming majority of all settlers in Ibarian peninsula.[20] Ibn Ghālib calls them 'Jamm al-Ghafīr' or the multitudious crowds of Spain.[21]

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(17) Ibn Sa'd, al-Ṭabaqāt al-Kubrā, Bairut, 1377/1957 Vol, V, pp, 523,35.

(18) Ibid, Vol, V, pp. 535-48

(19) Husain Munis, Fajr al-Andalus, Cairo, 1959, p.270

(20) Al-Maqqarī, Nafh al-Ṭīb, Cairo, 1302 A.H. Vol, I; و هم الأكثر فى الاندلس .

(21) Husain Munis, Fajr al-Andalus, p. 369; و هم جـم الغفير بالاندلـــس

Al-Tujīb, the family tribe of Abū- al-Walīd Bājī also migrated with her sister tribes. Dr. Husain Munis has drawn a chart indicating the places of expension of these tribe in Spain. This illustration shows that Tujibites were settled in Seville (Ashbīliyah), Barcelona (Barshilūnah), Beja (Bājah), Saragossa (Sarqustah) and Bedajoz (Batliyūs).(22) (I)

S O C I O - P O L I T I C A L P O S I T I O N O F T H E T U J Ī B F A M I L Y :

In pre-Islamic period the ancestors of Tujib family had the political supremacy in Yaman, Hadramowt and other southern parts of Arabia. They held the important posts in the administration of the earliest phase of the caliphs in different places of the Muslim state. Having an overwhelming majority in Spain they played an important part in making the Socio-Political history of the Muslim Spain. Al-Tujīb, the tribe of al-Bājī, had a considerable share in these efforts. In the latter period (in the 5th century of Hijra), Tujibits though had their own dynasties in Spain, yet they held the key posts in Ummayad administration.

During the reign of Hakam al-Muntasir (350 A.H/961 A.D. to 366 A.H/976 A.D), 'Āsī Ibn Hakam, a Tujibite Amir of Calatayub (Qila'h Ayūb) was holding the office of the Chief Minister. Yahyā Ibn Muhammad, another member of Tujib family was the minister of that Ummayad Sultan. Sāhib al-Shurtah al-wustā (almost equivalent to the Deputy Inspector General Police) was an important post in the

(22) Ibid, pp.372-377; See also chart.

civil administration. Ibn Muḥammad, 'Abd al-'Azīz Ibn Hakm and 'Abd al-Raḥmān Ibn Yaḥyā were the members of Tujib family each one of whom was holding this important post in those days.(23)

The members of Tujib family, besides their important role in civil administration, also played a great part in Spainsh judiciary. Al-Māliqī (713-793 A.H) in his Tārīkh Quḍāt al-Andalus (History of the Judges of Spain) has mentioned some names of Tujibite judges like, Muḥammad Ibn Aḥmad Known as Ibn al-Hajj,(24) Yaḥyā Ibn Zayd(25) and 'Abd Allāh Ibn Muhammad.(26)

The family of al-Bājī did not produce, merely politicians, administraters and judges, as we find a large number of scholars belonged to this family. Ibn al-Faraḍī (d.403 A.H) in his, Tārīkh al-'Ulamā wa al-Ruwāt bi 'al-Andalus, (History of the scholars and narrators of Spain) has discussed the biographies of some scholars ancestors of Abū al-Walīd al-Bājī. Among them Aḥmad Ibn Muḥammad, better known as al-Kashkinyānī,(27) Sa'īd al-A'naqī(28) 'Abd Allāh Ibn Fatah,(29) 'Abd Allāh Ibn Muḥammad,(30) 'Abd Allāh al-Ziyāt,(31) Yaḥyā Ibn Yazīd,(32) Yazīd Ibn Yaḥyā(33) were the prominent scholars.

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(23) Ibn Hayyān, Al-Muqtabas fī akhbār balad al-Andalus, Bairut, 1965. pp.75,119, 120,105,225,
(24) Al-Māliqī , Tārīkh Quḍat al-Andalus, Cairo, 1948 pp.102-3,183.
(25) Ibid, p. 43.
(26) Ibid, p. 127
(27) Ibn al-Faraḍī, Tārīkh al-'Ulamā wa'l Ruwāt bil Andalus, Cairo, 1373/1954, Vol, I ,p.61
(28) Ibid, Vol, I , p. 165.
(29) Ibid, Vol, I , p. 279.
(30) Ibid, Vol, I , p. 271.
(31) Ibid , Vol, I , p. 288.
(32) Ibid, Vol, II, p. 195.
(33) Ibid, Vol, II, p. 174.

About al-Bājī's father we find only one reference in Ibn Ḥayyān's work, Al-Muqtabas fī Akhbār Bilād al-Andalus, which indicates that al-Bājī's father, Khalaf Ibn Sa'd was holding some key position in the court of the Ruler of Gonzalo (Ghinda Shalab) and at one stage appeared as the Ambassador of this court in the court of Ḥakam al-Muntaṣir, the Ummayid Ruler on Saturday, the 17th of Shawwāl 363 A.H. (about fourty years before the birth of al-Bājī). The statement of Ibn Ḥayyān reads:

"On Saturday 17th of Shawwal the Caliph al-Ḥakam held a meeting in al-Zahra palace to receive the ambassadors of different countries who gathered at the entrance waiting for admission to the Caliph's presence.

The minister of the Caliph and dignitories of chamberlains were also usually present. The protocols and guards were standing to the inside and outside the palace ....then there admitted two ambassadors, namely al-Qawmus Sulaymān and Khalaf Ibn Sa'd from Gonzalo.(34)

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(34) Ibn Ḥayyān, Al-Muqtabas, Bairut, 1965, pp. 241-2.

وفي يوم السبت لثلاث عشرة بقيت من شوال منها قعد الخليفة الحكم
على السرير في المجلس الشرقي من قصر الزهراء اثر قعود واجله لرسل املاك
اجتمعوا ببابه شهده وزراؤه وحجبه حجابه على عادته ....
وتوصل بعده اسماء رسول فرذلند بن الشور مع صاحبه فرذلند القمس
وصاحبه وتوصل بعدهم رسولا غند شلب القومس سليمان وخلف بن سعد
فذكر كل فريق منهم احوال بلده وانهى ما تقبل مرسله من الرغبة في صلة حبل
سلمه فتوطئوا بحفل ووصلوا وحبوا بجزيل وانطلقوا الى مرسليهم .

II- EDUCATION

AL-BĀJĪ'S EDUCATION IN SPAIN:

Abū al-Walīd al-Bājī received primary education in Beja in some local mosque as says al-Muqqari :

فليس لاهل الاندلس مدارس تعينهم على طلب العلم بل يقرؤن جميع العلوم فى المساجد باجرة

"The Andalusians do not build separate places for their education. They learn all science in mosques on payment".[35]

In his time Cordova had developed into a centre of higher studies. Al-Bājī was also attracted to the Spanish capital for higher education. Ibn Bashkuwāl has named three scholars with whom al-Bājī studied Hadīth and law —— (i) Qāḍī Yūnus ibn 'Abd Allāh, (ii) Abū Muḥammad Makkī ibn Abū Ṭālib al-Maqqarī and (iii) Abū Sa'īd al-Ja'farī,[36] Among them Yūnus ibn 'Abd Allāh (338/950-429/1038) had a very important position. He worked as the Judge of Bedajoz and Cordova, Minister and adviser to Hishām Ibn Muḥammad, Khaṭīb of Jāmi' Zāhra, and member of the Shūrā' council. He also wrote a commentary on al-Mālik's al-Muwwaṭṭa' under the title of "al-Maw'ab.[37]

Al-Bājī's stay in Cordova was for about six years. Hence, he is also called "al-Qurṭubī" by no less an authority than al-Kutubī and Ibn al 'Imād.[38]

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(35) Al-Maqqarī, Nafh al-Ṭīb, Vol I, p,101, Cairo, 1302 A.H.

(36) Ibn Bashkuwāl, K. al-Silah, Vol I, p,197, Cairo, 1374/195[illegible]

(37) Zirakli, al-A'lām, Vol IX, p,345-6, Vol, Cairo, 1378/1959.

(38) Al-Kutubī , Fuwāl al-Wafayāt, Vol I,P,356, Cairo,1951; Ibn 'Imād, Shadharāt al-Mudhdhahab, III : 345, Cairo, 1374/1955.

Among other teacher of al-Bājī in Spain were, (i) Abū al-Aṣbagh, (ii) Abū Muḥammad Mālikī (355-448 A.H), (iii) Abū Shākir and (iv) Muḥammad ibn Isma'īl as has been mentioned by Ibn Bashkuwāl and Ibn al-'Imād.(39)

TRAVEL TO MECCA :

A common practice of the Muslim scholars of the Middle Ages was to make direct contact with prominent 'Ulamā and living authorities. Abū al-Walīd al-Bājī following this practice, left his motherland to come in direct contact with the living authorities of his period. He left Spain, as held by his biographers, in 426 A.H./1034 A.D. and visited Mecca to perform Hajj and reached the holy city probably in Shawwāl or Dhī al-Qa'dah and performed his first ḥajj in the same year.

At Mecca he met the eminent Malikite scholar Abū Dharr al-Harawī known as Ibn Samāk. 'Abd ibn Aḥmad ibn Muḥammad ibn 'Abd Allāh ibn 'Afīr al-Anṣārī or Ibn Samāk was well-acquainted with the Ulema of Hirāt, Sarakhs, Balkh , Marw, Basrah, Baghdād, Damascus and Egypt and their legal and theological views. Al-Bājī therefore, enjoyed his association and stayed with Ibn Samāk for three years (up to 429 A.H.) In all he performed hajj four times. During this period he also travelled with his teacher to Sarawāt.(40)

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(39) Ibn Bashkuwāl, K. al-Silah, Vol. I, p 197, Cairo 1374/1955; Ibn 'Imād, Shadharat al-Mudhdhahab, III :345, Cairo, 1374/1955.

(40) Al-Maqqarī, Nafḥ al-Ṭīb, Vol. I, p 355, Cairo, 1302 A.H; the statement reads:
و حج الباجى رحمه الله تعالى اربع حجج جاوز فيها ثلاثة اعوام ملازما

Biographers like Ibn Bashkuwal and Ibn al 'Imad also mention (i) al-Matu'i (ii) Abu Bakr ibn Sahtuyah, (iii) Ibn Muhadhdhar and (iv) Ibn Muhammad al-warraq among these with whom al-Baji studied at Mecca.(41)

Though the biographers are silent about his visit to Medina — the city of the Prophet and the great centre of the Malikite school. It is obvious that he must have definitely visited Medina.

A R R I V A L I N B A G H D A D :

Baghdad in those days was the centre of different schools of Law. Al-Baji paid a visit to this city to meet the living authorities of the legal schools.

During his stay in Baghdad he was benefited by (i) Abu al-Tayyib Tahir ibn 'Abd Allah al-Tabari, a famous historian and Shafi'ite Jurist, (ii) Abu Ishaq Ibrahim ibn 'Ali al-Shirazi, (iii) Abu 'Abd Allah al-Hasan ibn 'Ali al-Saymari, a Hanafite judge (Qadi) from whom he learned the Hanafite Jurisprudence. (iv) Abu al-Fadl al'Arus al-Maliki, and (v) Abu 'Abd Allah al-Damghani. The famous historian and narrator, Hafiz Abu Bakr al-Khatib al-Baghdadi was a contemporary of al-Baji and was living in Baghdad at the time of his arrival. They have narrated ahadith from each other.(42)

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(41) Ibn Baghkuwal, K. al-Silah, Vol, I, Pp. 197-8; Ibn 'Imad Shadharat al-Mudhdhahab, Vol, III, p.345.

(42) Ibid.

At Baghdād al-Bājī held numerous majālis and dars, attended various intellectual gatherings and delivered many public lectures. His popularity among the higher intellectual circles can be judged by the following event.

His eldest son, Abū al-Qāsim, once came to Baghdād and was introduced to the Chief Judge al-Shāghī by Abū 'Alī al-Sukkarah in the words, "this is the son of the Shaykh of Spain". The chief judge said, "Oh, he must be the son of al-Bājī." Passing three years in the intellectual atmosphere of Baghdād al-Bājī left the city in about 431 A.H/1040 A.D. (43)

IN MŪṢAL :

Al-Bājī, then proceeded Mawṣil where he met the great scholor, Abū Ja'far al-Samnānī. It "under his guidance that al-Bājī", says al-Maqqarī, became more well grounded in theology, ḥadīth law, and other sciences". He stayed with al-Samnānī for one year (44) and left the town in about 432 A.H/1041 A.D.

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(43) Ibid. ; Ibn Khallikān, Wafayāt al-A'yān , Cairo, 1367/1948. Vol, II . P. 142.

(44) Al-Maqqarī , Nafḥ al-Ṭīb, Cairo, 1302 A.H. Vol, I, P. 355;'

و أقام بالموصل سنة مع ابى جعفر السمنانى - يأخذ عنه علم الكلام فبرع
فى الحديث و علله و رجاله و فى الفقه و غوامضه و خلافه و فى الكلام و
مـــذاهبـــه -

AS JUDGE OF HALAB:

Al-Baji's travels are discussed upto his arrival at Mawsil by most of the historians, there after the chain of his journey is not systematically traced. Ibn Baghkuwal, (d. 578 A.H) an early biographer on al-Baji, merely mentions his visit to Demascus and Egypt, as the places where he went after Mawsil. But the historians of later period like Ibn Khallikan (d. 681 A.H) and Ibn Farhun (d. 799 A.H) are of opinion that al-Baji went to Halab where he was appointed Judge of the city.(45) Geographical route supports the view that after Mawsil he went to Halab.

IN DEMASCUS:

After performing his duties as Judge in Halab for about one year, al-Baji came to Demascus, the seat of the Syrian school of Law. He met the prominent jurists like, (i) 'Abd al-Rahman ibn al-Tayuri, (ii) Ibn Ghalib and (iii) al-Simsar, and learned from them. His period of stay is not determined by the authorities.

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(45) Ibn Khallikan, Wafayat al-'Ay'an, Cairo, 1367/1948 Vol, II p. 142, Ibn Farhun, Dibaj al-Mudhahhab, Cairo, 1351. A.H, p. 120.

و قد قيل انه ولى قضاء حلب

I N   E G Y P T :

While passing through Egypt he stayed with the Egyption Jurist Abū Muḥammad ibn al-Walīd from whom he learned law and jurisprudence.

In the list of about thirty teachers of al-Bājī the biographers like Ibn Bashkuwāl and Ibn al-'Imād mention the names of scholars as, (i) Abū 'Abd Allāh Muḥammad ibn al-Ṣūrī, (ii) Abū al-Ḥasan al-'Atīqī, (iii) Abū al-Najīb al-Arwānī, (iv) Abū al-Fataḥ al-Tanjīrī, (v) Abū 'Alī al-'Aṭṭār and (vi) Abū al-Ḥasan ibn Zowj al-Hurrah without mentioning their native cities. It can, however, be said that al-Bājī also learned from these scholors abviously during his travels to the east.(46)

The total period of al-Bājī's stay in the east, is unanimously determined as thirteen years, out of which he spent eight years in Mecca, Baghdād, Mawṣil and Ḥalab. The remaining five years were spent in Damascus, Egypt and places which are not mentioned by the historians. He, thus, returned to his native land, Spain in 439 A.H/ 1047 A.D.

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(46) Ibn Bashkuwāl, K. al-Silah, Cairo 1374/1955, Vol, I PP. 197-8, Ibn 'Imād, Shadharāt al-Mudhdhahab, Cairo, 1350, A.H, Vol, III P. 345.

III - TEACHING CAREER

EARLY PERIOD OF TEACHING :

The life of this great jurist, says Ibn Farḥun, started in a state of destitution. After his return to Spain, he began to write legal documents and deeds, employed to manufacture golden thread by hammering gold pieces, to be used in silk-garments. He also earned his livelihood by presenting his verses to his rich admirers.(47) Besides these occupations for earning his bread, he devoted his time in teaching students and writing books. "When he delivered lectures", says Ibn Farḥūn "signs of handling the hammer could be seen on his palms. He continued his struggle so much so that his scholarship was recognized, his writings became well known, his position in society established and he became favourite the rich and chiefs."(48)

Regarding al-Bājī's dars Ibn Bashkuwāl states that about three thousand students attended his lectures,(49) which is undoubtedly a sign of his popularity among the Spanish intelligentsia. Abū Alī ibn Sukrah, one of the attending scholars of his dars, remarks;

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(47) Ibn Farḥūn, Dibaj al-Mudhdhahab, Cairo, 1351 A.H., P.120; وأول وروده الأندلس مقلا في دنياه حتى احتاج في سيره الى القصد بشعره ....كان يتولى ضرب ودق الذهب للغزل و الابرار ويعقد الوثائق

(48) Ibid. وقيل انه يخرج للاقراء وفي يده اثر المطرقة الى ان نشاعلمه وشهرت تآليفه عرف حقه وعظم جاهه

(49) Ibn Bashkuwal, K. al-Silah, Cairo, 1374/1955, Vol. I, P.198; كان يحضر مجلس سليمان رحمه الله ثلاثة الاف رجل للسماع منه

ما رأيت مثله و مارايت على سمته و هيئته و توقير مجلسه
و هو احد ائمة المسلمين

"I never saw a scholar like Abū al-Walīd, and I never found a man like him in keeping his personality and commanding respect and reverence in meetings. He was one of the Imāms of the Muslims".(50)

PLACES OF TEACHING :

About the places of his teaching, Dr. Husain Munis says:-

و عاد الى الاندلس و جلس للاقراء بسرقسطه و بلنسيه ومرسية ودانيه

"On his return to Spain he taught in the cities of Saragossa, Valencia, Murcia and Denia".(51)

Although Dr. Munis does not mention his sources, the usual trade routes of Al-Bājī's period confirm Dr. Muni's statement that al-Bājī first settled at Murcia. His part-time profession of embroidery might have led him to Murcia which was famous for the garments made of wool, cotton and silk.(52) Al-Bājī thus started his education career at Murcia. From here he went to Denia -(Dianium of Roma) a port city on the eastern soil of Spain. After sometime he settled at Valencia- a port and the third largest city of Spain.(53) His stay at Saragossa was evidently at his old age, as he was in this city as a teacher and judge. This post was naturally offered to him

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(50) Ibid.

(51) Husain Munis, Al-Fikr al-Andalusī, Cairo, 1955, p.425.

(52) ʿAbd Allāh ʿAnnān, Al-Athār al-Andalusiyah al-Bāqiyah, Cairo, 1375/1956 p.74.

(53) Ibid, p. 68
بلنسية هى اليوم ثالثه المدن الاسبانيه بعد موزيد و برشلونة

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when his fame had spread and he had earned his reputation, as a jurist. He must have, therefore, stayed at Saragossa after his stay at Murcia, Denia and Valencia.

STUDENTS :

Among his students are enumerated some great authorities of Spain, who are well-known for their vast knowledge and scholarship. The names of some important puplis of al-Bājī are mentioned below;

(1) Ḥusayn ibn Muḥammad Abū 'Alī al-Ṣadafī (444/1052-516/1122); A well known jurist and muḥaddith studied with al-Bājī at Saragossa, worked as the judge of al-Meria, travelled to the east and wrote some books.(54)

(2) Muḥammad ibn Walīd al-Ṭarṭūshī : A famous jurist, better known as Ibn Abī Randaqah, studied with al-Bājī at Saragossa, travelled to east and wrote several books like, Mukhtaṣar Tafsīr al-Thālabī, al-Kabīr fī masā'il al-Khilāf; Fī Taḥrīm jubn al-Rūm, Sirāj al-Mulūk, Bid'u 'al-Umūr, Sharaḥ Risālah ibn Abī Zaydun etc.(55)

(3) Muḥammad ibn 'Abd al-Raḥmān alias Ibn Shibrin : An eminant jurist and the judge of Sevelli, went to Saragossa in 467 A.H. and studied with al-Bājī . When his master (al-Bājī) left Sargossa for Al-Meria he also travelled with him till al-Bājī died in 474 A.H. He then stayed for sometime with his son Abu 'al-Qāsim.(56)

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(54) Al-Maqqari, ~~Qāḍī 'Iyāḍ~~, Azhār al-Riyāḍ, Cairo, 1359/1940 Vol. III p. 15, Shakīb Arsalān, al-Ḥulal al-Sundusiyyah, Cairo, 1358/1939, Vol. III p. 40.

(55) Ibid, Vol, III, pp. 16,162-3; Ibn Sa'īd, al-Mughrab fī ḥulal- al-maghrib, Cairo, 1955, Vol. I, p.424.

(56) Ibid, Vol, III , pp. 155-6

(4) Husayn ibn Muhammad al-Ghassani, al-Jayyani: A popular muhaddith of Cordova, studied hadith and its allied sciences with al-Baji, and wrote books on the rijal of Sahihayn namely, Taqyid al-Muhmal, and Tamyiz al-Mughkil.(57)

(5) Khulays ibn 'Abd Allah al-'Abidi (437/513), a judge of Vallenica, studied with al-Baji probably in Vallencia as he haild from the same city.(58)

(6) Sulayman ibn Abu 'al-Qasim Najah: A prominent scholar and the author of many books on Qur'anic philosophy, studied with al-Baji either in Vallencia or in Denia, as he lived both the towns.(59)

(7) Khalaf ibn Mufarraj ibn Sa'id al-Kinani; A Shafi'ite jurist and a judge also studied with al-Baji.(60)

(8) Khalaf ibn 'Umar ibn Khalaf ibn Sa'd ibn Ayyub (d. about 500 A.H), nephew of al-Baji, was the inhabitant of Saragossa, studied with his uncle al-Baji in Sargossa and became the judge of the city.(61)

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(57) Ibid, Vol, III p. 149.

(58) Ibn Baghkuwal, K. al-Silah, Cairo, 1374/1955, Vol. I p. 178.

(59) Ibid, Vol, I. p. 200.

(60) Ibn Al-Abbar, al-Takmilah bi kitab al-Silah, Cairo, 1375/1956, Vol. I p. 300.

(61) Ibid.

(9) Ahmad ibn Sulayman al-Baji (d. 493 A.H/1101 A.D) His son and a prominent jurist was also his student. After al-Baji's death he narrated his books to the students as his successor. He also travelled to east and met the authorities of different subjects and wrote some books.(62)

(10) Ali ibn 'Abd Allah, Ibn Mawhab (441/1050-532/1138) : A well known commentator(mufassir) and jurist of al-Meria, studied with al-Baji in his last days at al-Meria and narrated his books to al-Ashbili for his al-Fihrist, wrote a commentary of al-Qur'an.(63)

(11) Isa ibn Muhammad ibn Sa'id Abu al-Asbagh, better known as Ibn Muzayyin (d. 445/1054). After a number of battles with al-Mu'tadid ibn 'Abad, Ibn Muzayyin founded his own dynasty in silves in 440 A.H. and assumed the little of al-Muzaffar. Under the Umayyaids he was a judge. He studied jurisprudence with al-Baji and also narrated his books to al-Ashbili, the author of al-Fihrist.(64)

(12) Shu'ayb ibn 'Isa, Maqqari al-Ashja'i (d. 538/1143 An author and also a narrater of al-Baji's works.(65)

(13) 'Abd al-'Aziz ibn Khalaf, ibn Mudir al-Azadi (d. 544 A.H.) : A teacher and well known jurist of Cordova, studied with al-Baji and narrated his books to the students(66)

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(62) Ibn Bashkuwal, K. al-Silah, Vol, I p. 73.

(63) Zirkali, al-A'lam, Cairo, 1961 A.D. Vol, V . p. 119.

(64) Ibid, Vol, V p. 292; Al-Ashbili, al-Fihrist, Bairut, 1382/1963, p. 256.

(65) Ibid, Vol, III p. 245.

(66) Ibn Bashkuwal, K.al-Silah,Cairo, 1374/1955. Vol, I p.355.

This brief introduction of some of the students of al-Bājī indicates that his deciples earned name and fame as jurists. muḥaddith, writers, amīrs and judges of Spanish paninsula.

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IV - WORKS OF AL-BAJI

HIS BOOKS IN AL-ASHBILI'S AL-FIHRIST

For the first time detailed informations on the works of al-Baji have been provided by Khalifah al-Ashbili (502/1108-575/1179). In his al-Fihrist, we find the following minor and major works:

(1) Al-Isharah 'ila ma'rifat al-Usual wa al-wajarah fi ma'na al-Dalil : This book was transmitted to al-Ashbili through four sources, (i) Abu Bakr 'Abd al-Aziz ibn Khalaf ibn Mudir al-Azdi with whom his father read the book and from whom al-Ashbili heard, (ii) Abu al-Asbagh 'Isa b. Muhammad b. 'Ali b. Bahr in whose presence the book was read while he (al-Ashbili) listened; (iii) Abu al-Hasan 'Ali b. 'Abd Allah al-Mawhab permitted him to narrate the book, and (iv) Abu Muhammad Shu'ayb b. 'Isa al-Maqqari personally gave him the permission for its narration.(67)

The book is generally known to the authors of the later period as, " al-Isharah fi usual al-Fiqh". Its one munuscript is preserved in the Library of al-jami'a al-Azhar (Egypt) and the other in Scurial, Madrid (Spain).

(2) Ahkam al-Fusul fi ihkam al-Usul: This book was also transmitted to al-Ashbili by (i) Abu al-Asbagh by way of reading and permission and, (ii) Abu al-Hasan by way of permission of its narration.(68)

(67) Al-Ashbili, al-Fihrist, Bairut, 1382/1963, vol. p. 255.

(68) Ibid.

(3) Al-Ḥudud: The book is on Jurisprudence and was narrated to al-Ashbili by (i) Abu al-Asbagh and (ii) Abu al-Ḥasan.(69)

Ibn Farhun writes the full title of this book is, "al-Ḥudud fi uṣual al-Fiqh".(70)

(4) Mas'alah al-Janaiz: this book was also transmitted to al-Ashbili by the same authorities.(71)

(5) Al-Tasdid ila ma'rifat ṭuruq al-tawhid ; This book also reached al-Ashbili by, (i) Abu al-Asbagh and (ii) Abu al-Ḥasan by way of permission from Abu al-Walid al-Baji.(72)

(6) Al-Tabyin 'an Sabil al-Muhtadin: Al-Ashbili got this book through , (i) Abu al-Aṣbagh from whom he read some parts of it and was permitted to narrate its whole text, and through (ii) Abu El-Ḥasan by way of permission. They transmitted the book directly from al-Baji.

(7) Raf' al-Iltibas fi ṣiḥḥat al-Ta'abbud: This book reached al-Ashbili through, (i) Abu al-Asbagh with whom he read the book and (ii) Abu al-Ḥasan by way of permission. Abu al-Walid al-Baji narrated it to them.(74)

(69) Ibid, P. 256
(70) Ibn Farhun, Dibaj al-Mudhahab, Cairo, 1351 A.H. p.12
(71) Al-Ashbili, al-Fihrist, Bairut, 1382/1963, p. 256.
(72) Ibid.
(73) Ibid.
(74) Ibid.

(8) Al-Ta'dil wa al-Tajrih liman Kharraja 'anhu al-Bukhari fi al-Sahih : This book was transmitted to al-Ashbili also through (i) Abu al-Asbagh and (ii) Abu al-Hasan.(75)

(9) Sunan al-Salihin wa Sunan al-'Abidin: The book reached al-Ashbili from al-Baji through (i) Abu al-Asbagh personally from him, and (ii) Abu al-Hasan by way of permission.(76)

Ibn Farhun mentions its exact title as, al-Sunan fi'l rija' wa al-Zuhd wa al-Wa'z.(77)

(10) Al-Muntaqa fi Sahih al-Muwatta: The book was transmitted to al-Ashbili through (i) Abu al-Asbagh by way of personal realisation of the book, and (ii) Abu Muhammad Shu'ayb b. 'Isa al-Maqqari by way of permission. These authorities had been narrated the book from Abu al-Walid the author of this book.(78)

Ibn Farhun thinks that this book is actually the summary of al-Baji's work, al-Istifa fi Sharah al-Muwatta.(79)

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(75) Ibid, P. 242.

(76) Ibid, P. 277

(77) Ibn Farhun, Dibaj al-Mudhahhab, P. 122

(78) Al-Ashbili, al-Fihrist, P. 86

(79) Ibn Farhun , Dibaj al-Mudhahab, P. 121

(11) Tabyin al-Minhaj fi tartib al-Hujjaj : The book was narrated to al-Ighbili through (i) Abu al-Asbagh and (ii) Abu al-Hasan by way of permission from al-Baji. (80)

Ibn Farhun in his Dibaj al-Mudhahhab mentions the title of this book as "Tabyin al-minhaj", and a different book entitled, "al-siraj fi 'ilm al-hujjaj. (81)

(12) Fihrist: The jurist Abu al-Walid also prepared a collection of the known books. This collection reached al-Ighbili through (i) Abu Muhammad b. 'Isa al-Maqqari, (ii) Abu al-Asbagh and (iii) Abu al-Hasan by way of perso[nal] realisation of the collection, permission and reading. (82)

(13) Wasiyat al-Qadi Abu al-Walid li ibnayh: Abu al-Wali[d] al-Baji explained and transmitted his will to (i) Abu al-Asbagh with whom al-Ashbili read it, and to (ii) Abu al-Husan from whom he got the permission of narrating the same. (83)

Though ibn Baghkuwal (494 A.H.) and Ibn Khallikan (608-681 A.H.), are among the early biographers of al-Baji, they do not give a comprehensive list of al-Baji's works. The former mentions his one book only while the latter states only three books which al-Ighbili included in his al-Fihrist.

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(80) Al-Ashbili, al-Fihrist, P. 256.

(81) Ibn Farhun, Dibaj al-Mudhahhab, P. 121.

(82) Al-Ashbili, Al-Fihrist, 429.

(83) Ibid.

BOOKS INTRODUCED BY LATER AUTHORITIES:

Ibn Farhun (d. 799 A.H) in his al-Dibaj al-Mudhahhab has given a detailed account of al-Baji's works. He rather introduces some other books which al-Ashbili has left, namely;

(14) Al-Istifa' fi sharh al-Muwatta : A very comprehensive commentary of Imam Malik's al-Muwatta.(84)

(15) Al-'Ijma': This work also relates to al-Muwatta. Ibn Farhun thinks that this is a summary of al-Baji's al-Muntaqa.(85)

Isma'il Pasha in his, Asma' al-Muallifin wa athar al-Mussanifin mentions its full title as 'Al-'Ijma' fi al-Fiqh, which he says contains five volumes.(86)

(16) Masa'il al-Khilaf : In the opinion of Ibn Farhun the book was not completed by Abu al-Walid al-Baji.(87)

(17) Al-Muqtabas fi 'ilm Malik ibn Anas ; An incomplete work of al-Baji.(88)

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(84) Ibn Farhun, Dibaj al-Mudhdhahab, p. 121

(85) Ibid.

(86) Isma'il Pasha, Asma' al-Muwallifin wa Athar al-Mussanifin , Istanbul, 1361 A.H. Vol.I , p.397.

(87) Ibn Farhun, Dibaj al-Mudhahhab, p. 122.

(88) Ibid.

(18) <u>Al-Muhadhdhab fī Ikhtiṣār al-Mudawwanah</u> : An

(19) <u>Sharḥ al-Mudawwanah</u>;

(20) <u>Ikhtilāf al-Muwaṭṭa</u>;

(21) <u>Masā'il Ikhtilāf al-Zawjayn fī al-ṣudāq</u>;

(22) <u>Mukhtaṣar al-Mukhtaṣar fī masā'il al-Mudawwanah</u>;

(23) <u>Tafsīr al-Qur'ān</u> : An incomplete commentary of the Holy Qur'an (89)

(24) <u>Firāq al-Fuqahā'</u> : Ibn Farhun says that Ibn Hilal personally saw this book in Alexandiria. (90)

(25) <u>Al-Nāsikh wa al-Mansūkh</u> : According to Ibn Farḥūn an incomplete work of al-Bājī. (91)

(26) <u>Fī masḥ al-r'as</u> ;

(27) <u>Fī Ghasl al-rijlayn</u>;

(28) <u>Taḥqīq al-Mazhab</u>; (92)

(29) <u>Al-Sirāj fī ʿilm al-ḥijāj</u>.

Al-Maqqarī (d. 1041 A.H. 1632 A.D.) transmitted the same books in his <u>Nafḥ al. Ṭib</u> as described by his preceding biographers. He only adds one book in his list, entitled;

(30) <u>Al-Ma'ānī fī sharḥ al-Muwaṭṭa</u> : A comprehensive commentary of Maliks <u>al-Muwaṭṭa</u> in twenty volumes. (93)

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(89) <u>Ibid</u>.

(90) <u>Ibid</u>. ——— قال ابن هلال رأيته فى الاسكندريه

(91) <u>Ibid</u>. كتاب الناسخ و المنسوخ لم يتم

(92) <u>Ibid</u>.

(93) Al-Maqqarī, <u>Nafḥ al-Ṭīb</u>, Cairo, 1302 A.H. Vol.I. p. 354;

و قال بعضهم انه صنف كتاب المعانى فى شرح الموطأ نحو عشرين مجلدا عديم النظير.

POETARY :

Al-Bājī besides his contributions in the field of religions learning, has a share in the Arabic poetical literature of Spain. But since no dīwān or a collection of his poetry has survived it is evident that most of his poetical works perished.

The early biographers like Ibn Bashkuwāl (494/1100-578/1182) and Ibn Khallikān (608-681 A.H.) have mentioned only the following quatrain (rubā'ī) which the later authorities have repeatedly quoted in their works;(94)

اذا كنت اعلم علما يقينا بان جميع حياتى كساعه
فلم لا أكون ضنينا بها واجعلها فى صلاح و طاعه

The famous historian of Seville al-Fatḥ Ibn 'Abd Allāh known as Ibn Khāqān (480/1087-528/1134) in his Qalā'id al-Iqyān, mentions besides the above quatrain the following two Elegies of al-Bājī which he wrote on the death of his sons.(95)

رعى الله قبرين استكانا ببلدة هما اسكناها فى السواد من قلب
لئن غيباعن ناظرى و تواريا فوادى لقد زاد التباعد فى القرب
يقربعنى ان ازور تراهما والذق مكنون الترائب بالترب

(94) Ibn Bashkuwāl, K. al-Silah, Cairo, 1374/1955, Vol, I, p. 198; Ibn Khallikān, Wafayāt al-Ayān, Cairo, 1367/1948, Vol, II, p. 142.

(95) Ibn Khāqān, Qalā'id al 'Iqyān, Paris, 1860 A.D, p. 216.

و أبكى و أبكى ساكينها لعلني ... سا نجد من صحب و اسعد من سحب
فما ساعدت ورق الحمام اخاالسى ... ولاروحت ريح الصاعن اخى كـر ب
و لا استعذبدعيناى بعدهماكدى ... ولاضمت نفسى الى البارد العـذب
أحن ويثنى الياس نفسى عن الاسى ... كما اضطر محمول على المركب الصعب

احمد ان كنت بعدك صابــرا ... صبرالسليم لما به لايسلـم
وورثت قبلك بالنبى محمــد ... ولزوه ادهى لدى و اعظـم
فلقد علمت اننى بك لاحــق ... من بعدظنى اننى متقــدم
لله ذكرلايزال بخاطــرى ... متصرف فى جده متحكــم
فاذانظرت فشخصه متخيــل ... و اذا اصغت فصوته متـوهـم
ولكل ارضلى من اجلك لوعــة ... وبكل قبر وقفــة و تلــوم
فاذا دعوت سواك حادمن اسمه ... ودعاه باسمك مقول بك مغـرم
حكم الردى ومناهج قدسنهـا ... لاولى النهى والحزن قبل متمـم

Yāqūt al-Ḥamawī (574/1178-626/1229) in his Mu'jam al-'Udabā', repeats the same Elegies with an addition of the following quatrians;[96]

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(96) Yāqūt al-Ḥamawī, Mu'jam al-'Udabā, Cairo, 1357/1938, Vol, XI, pp.249-51.

(١) ما طال عهدى بالديار و انـــــــا

انسى معاهدها أسى و تبلــــــــد

لو كنت أنبات الـــديار صبابتـــــى

دق الصفا بفنائهـــــا و الجلـــــد

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(٢) ليس عندى شخص النـــوى بعظيم

فيه غـم و فيــه كشـف غمـــم

ان فيه اعتناقة لـــــــــــــــوداع

و انتظـــار اعتناقـــــة لقـــدوم

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(٣) عباد استعبد البـــــــــرايا

بأنعـــــم فاقت النعائـــــــم

مديحـــــه ضمن كل قلــــــب

حتى تغنـــت به الحمـــائـــم

Ibn Sa'id al-Maghribi (610/1214-685/1286) in his poetical collection, al-Mughrib fi hulal al-Maghrib (97) also mentions the above verses.

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(97) Ibn Sa'id, al-Mughrib fi hulal al-Maghrib, Cairo, 1953, Vol, I, pp. 404-5.

Al-Kutubī (d. 764 A.H.) in his Fuwāt al-wafayāt (98) includes a new quatrian which reads:

تذت من نهلك تم لاكجيــــد

لذى الذنب عن هول يوم الحساب

فاعص الاله بمقـــــدارما

تجد لنفسك سوء العـــــذاب

Al-Maqqarī (d. 1041 A.H/1632 A.D) amongest the latter authorities has mentioned some more verses in his Nafḥ al-Ṭīb . He narrates that once al-Bājī visited the lecture room of Abū 'Alī in Baghdād. It was a rainy - day and all students of 'Alī except one were absent because of the inclement weather. This student was as usualy busy with his work. Realising his unusual devotion and concentration in his studies al-Bājī expressed his appreciation in the following verses: (99)

و بيت للمجد و الساعون قد بلغــوا

حد النفوس و القوادونه ــــــ الازرا

و كابدوا المجد حتى مل اكثرهـــم

و عانق المجد من وانى و من جـــدا

(98) Al-Kutubī, Fuwāt al-Wafayāt, Cairo,1951, Vol. I, p. 35

(99) Al-Maqqarī, Nafḥ al-Ṭīb, Cairo, 1302 A.H, Vol. I, p. 356.

At another place al-Maqqarī quotes a poem of al-Bājī that reads as follows:[100]

آسروعلى الليل البهيم سراهـم

فنمت عليه في الشمال شمائـــل

فلله ما ضمت منى وشعابهـــا

وما ضمنت تلك الربى والمنــــازل

ولما التقينا للجمار و ابــــرزت

اكف لتقبيل الحصى و انا مــــحل

اشارت الينا بالغرام محا جــر

و باحت به منا جسوم نواحـــل

Another verse of his reads;[101]

مضى زمن المكـــارم و الكـــرام

سقاه الله من صوب الغمـــــام

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(100) Ibid, Vol, I, p. 362.

(101) Ibid.

Al-Maqqarī also quotes another qutrain :(102)

وزال النطق حتى لست تلقـــى

فتى ينحو برد للســــــــلام

وزاد الامر حتى ليس ـــــ الا

سخى باالاذى او بالمــــــــلام

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(102) Ibid.

V - DEBATES WITH CONTEMPORARIES.

INTRODUCTION OF ZAHIRITE SCHOOL IN SPAIN:

The theological and legal views of Dawudi ibn 'Ali al-Isbahani (d. 297 A.H), are known as 'al-Madhhab al-Zahiri'. The people of Spain were the followers of the Malikite school. The Zahiri sbhool was first introduced in to Spain by a student of Dawud, 'Abd Allah ibn Muhammad ibn Qasim Hilal (d. 272 A.H., 885 A.D.), a Malikite scholar, who had gone to the east in the middle of third century A.H. and returned to the country as a Zahirite jurist with the writings of his teacher Dawud.(103) Baqi ibn Mukhallad (d. 276 A.H.), Muhammad ibn Mas'ud ibn Sulayman Abu al-Khiyar (d.426 A.H.) are from those early Zahirite jurists who have a great contribution in spreading this school in Spain.

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(103) Husain Munis, al-Fikr al-andalusi, Cairo, 1955, P. 439.

كان أول من نشر مبادئ مذهب اهل الظاهر في الاندلس
عبد الله بن محمد ابن قاسم بن هلال (المتوفى ٢٧٢/ ٨٨٥
- ٨٦ م) وكان من اوائل الظاهريين عامة .... وكان
مالكيا و لكنه تتلمذ على داود الاصفهاني نشر مذهب الظاهر
و نسخ كتبه بخطه و اقبل بها الى الاندلس '

IBN HAZM :

Ibn Hazm (382/994-454/1063) was originally a Malikite scholar, then remained a shafi'te for sometime. He was influenced by his teacher Abu al-Khiyar and became the follower of the Zahirite school in 419 A.H/1029 A.D.(104) Within a very short period Ibn Hazm earned his fame as the Imam of the Zahirites and the founder of their sub-sect, Hazmiyah. Al-Baji returned to Spain in 439 A.H. Thus for a period of twenty years he spread his views. Ibn Farhun states.

ان ابا الوليد لما ورد الى الاندلس وجدبها ابن حزم الظاهرى و لم يكن فى الاندلس من يشتغل بعلمه نقصرت السنة نقهائها عن مجادلته و اتبعه جماعة على رأيه و احتل بجذيرة ميورقة فرأس بها و اتبعه اهلها .

When Abu al-Walid= arrived in Spain, he found Ibn Hazm over there (spreading his views). Everyone in Spain who had knowledge togetherwith the jurists failed to face him in theological debates and thus a group of people became devoted to his ideas. Ibn Hazm arrived in Mallorco, stayed there and a group of its inhabitants also accepted his views.(105)

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(104) Ibid, P. 215.

(105) Ibn Farhun, Dibaj al-Mudhahab, Cairo, 1351 A.H. P. 121.

DEBATES OF AL-BĀJĪ WITH IBN ḤAZM :

Ibn al-Abbār (d. 659 A.H.) has stated how and where Ibn Ḥazm and al-Bājī held theological discussions. Writing on a Mallorcian jurist, Muḥammad ibn Saʻīd Ibn al-Abbār says:

وصدر (محمد بن سعيد) الى ميورقة و قرأ للقراء
الفقه و الاصول ولما دخلها ابو محمد ابن حزم _ كتب
ابن سعيد هذا الى ابى الوليد الباجى فسار اليه من
بعض سواحل الاندلس و تظافرا جميعا عليه و ناظـراه
فامتحناه و اخرجاه منها •

"Ibn Saʻīd arrived in Mallorca and started teaching law and jurisprudence. When Ibn Ḥazm entered Mallorca, Ibn Saʻīd wrote about the sitution to Abū al-Walīd al-Bājī. He made the journey from a Spanish port. Both of them debated with Ibn Ḥazm, defeated him in the dual and ousted him from the city." (106)

Ibn Farḥūn states about the activities of al-Bājī

فلما وصل ابو الوليد تكلم فى ذلك سرحل اليـه
فرحل اليه وناظره وأبطل كلامه وله معه مجالس كثيرة قيدت بأيدى الناس •

"When Abū al-Walīd came to Know that the theologians have failed to face Ibn Ḥazm in Mallorca, he went to him debated with him and refuted his ideas. He held a number of debates with Ibn Ḥazm...." (107)

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(106) Ibn al-Abbar, Takmilah K. al-Silah, Cairo, 1375/1956, Vol, I, P. 191.

(107) Ibn Farḥūn, Dībāj al-Mudhdhab, P. 121

In the light of these statements, it is sure that (i) al-Bājī returned to Spain when Ibn Ḥazm was debating with the Malikite jurists in Mallorca, (ii) on the invitation of Ibn Sa'īd al-Bājī journeyed to the island to debate with Ibn Ḥazm.

The debates of al-Bājī and Ibn Ḥazm, observe Ibn Farḥūn and al-Maqqarī, were mostly of the theological nature, like the questions of 'Umarah al-Qaḍā' al-kitāb ʿalā al-Qurayṣh fī yawm Ḥudaybiyah (letter to the Quraish on the day of Hudaibiyah), Wujūb al-Khilāfah (necessity of calephate) etc. (108)

Ibn Ḥazm's fiery and fervent conversations are very well known, we also find some interesting dialogues of stricture between them. "I am greater than you in the struggle for knowledge, 'said Abū al-Walīd', when you acquired it you spent your nights in the light of golden candles (in the palace) and when I acquired knowledge I woke up whole night in street in street light". Ibn Ḥazm replied, "No Sir, this goes against you because you learned in such an atmosphere which you were trying to change for one I was already in (i.e. wealth and social position). But I acquired knowledge when I had nothing to worry for except to learn purely for the

(108) Ibid, al-Maqqarī, Nafh al-Ṭīb, Vil, I. P. 358. A detailed account of these issues can however be studied in Ibn Hazm's books al-Fiṣl (I: 88; IV: 208) and Rasā'il (PP. 19-31).

betterment of this life and the life hereafter." (109)

Besides such haughtly conversations Ibn Hazm had a great regard for Abū al-Walīd and looked upon him as leading scholars of Malikite school. He is reported to have said that,

لولم يكن لاصحاب المذهب المالكى بعد عبدالوهاب الامثل ابى الوليد الباجى لكفاهم

"After 'Abd al-Wahhāb if there were no other scholar among the malikites than Abū al-Walīd al-Bājī, it was not matter for them." (110)

The later authorities like Ibn Sa'īd al-Maghrabī (610/1214-685/1286) are of opinion that Ibn Hazm nevertheless was a dominating personality having fervent nature, but he could not succeed in spreading his school due to the dynamic campaign of al-Bājī. In the words of Ibn Sa'īd, نقل من غربه و كان سببا لإحراق كتبه . thus, ~~he (Ibn Hazm~~ al-Bāji cut the sharpness of his tongue and so it ~~fell from his position and al-Bājī~~ became the cause of burning his books. (111)

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(109) Al-Maqqarī, Nafh al-Tīb, Vol, I , P. 358; the text of this dialogue rèads;'

و لما ناظر ابن حزم قال له الباجى أنا اعظم منك همة فى طلب العلم لانك طلبته و انت معان عليه تسهر بمشكاة الذهب و طلبة وانا سهر بقنديل بائت السوق ـ فقال ابن حزم هذا الكلام عليك لانك انما طلبت العلم و انت فى تلك الحال الدجاء تبديلها بمثل حالى وانا طلبته فى حين ما تعلمه و ما ذكرته فلم ارج به الاعلوا القدر العلمى فى الدنيا والاخرة فافحمه ـ

(110) Ibid. وبلغنى عن ابن حزم انه كان يقول لولم يكن لاصحاب المذهب المالكى بعد عبدالوهاب الامثل ابى الوليد الباجى لكفاهم .

(111) Ibn Sa'id, al-Mughrab fi hulal al-Maghrib, Cairo, 1953, Vol, I , P. 405.

VI - CONTEMPORARY POLITICS AND AL-BĀJĪ.

POLITICAL CONDITIONS OF SPAIN BEFORE HIS TRAVEL TO THE EAST:

Spain upto the beginning of 5th century A.H. was a great political power of Umayyid Dynasty. On the north, the state met the borders of seven christian Kingdoms namely (i) Barcelona (ii) Gerdania (iii) Aragon (iv) Navarre (v) Leon (vi) Portugal and (vii) Pallars. On the remaining three sides, the state was surrounded by the Atlantic Ocean and the Mediterranean Sea.

As al-Bājī (403-474A-H) lived through the century under reference his interest in contemporary political affairs was quite natural. Before his travels to the east, he witnessed the following important events.

(1) The local amīrs of his native province. Seville were quarreling among themselves for power because of the weak centre of Cordova. Their repeated strifes and disputes disturbed the normal life of the area. The people getting tired of these amirs, gathered together and selected three men as members of a Council to administer their affairs. This Council consisted of (i) Abū Bakr Zubayrī, the author of the famous lexicon "Mukhtasar al-'Ayn" and the teacher of the Umayyid Caliph Hishām (ii) Muhammad ibn Barmak al-Hānī, and (iii) Abū al-Qāsim Muhammad, the provincial Chief Judge (of Seville) as a member and also the head of the Council. Thus a Government

of democratic type was established. This happened in 414 A.H/1023 A.D. when al-Bājī was yet a school going boy in Beja.[112]

(2) Al-Bājī arrived in Cordova for higher education in about 418 A.H, when Hishām III (d. 427/1035) was made the head of the Dynasty. Al-Bājī saw? the end of this last ruler of the house of the Umayyid in Cordova in 422 A.H/1031 A.D.[113] Moreover being the student of Yūnus ibn 'Abd Allāh (338/950-429/1038) the Minister and adviser to Hishām III and a member of the shūrā Council, al-Bājī understood the contemporary political affairs through his teacher.

(3) The people of Cordova met together and decided to entrust to Ibn Muḥammad al-Jahwar was a man of experience and wisdom. The auther of Arabian Spain refers to the statement of Ḥumaydi about the administration of al-Jahwar as follows;

"It must be said of Jawr that although he administered the Government and provided for the security of the capital, though he assumed in very respect the authority of the supreme ruler, he took none of the insignia of the Khilāfat, but ruled as none of his predecessors had done, declaring that he held the command until one more deserving of it or having better titles to the empire, should make his appearence, when he would immediately resign all authority and power into his hands.

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(112) Ibn Khaldūn, Tārikh, Cairo, 1284/1867, Vol, IV, pp. 156-8.

(113) Ibid.

He, thus, ordered that the palaces of Banī Umayyah should be kept in the same state as they had been under the regular Government and that the doorkeepers, the servents and guards should be stationed about the gates of them as in former times. He himself never inhabited them but resided at his own private house in the city."(114)

Abū al-Walīd al-Bājī had been a spectator of this form of Government till the year 426 A.H/1034 A.D. when he left Spain.

Al-Jahwar as a sincere person tried his utmost to make this dynasty a "Federal State". For that he wrote to Qāḍī Abū al-Abbād, Ruler of Seville, al-Mundhir, Ruler of Saragossa, and Ibn al-Dhī al-Nūn, Ruler of Toledo, but none of them listened to him and the poor fellow died in the month of Ṣafar 435 A.H. i.e. September, 1043 A.D.

(5) Al-Bājī returned to the homeland after thirteen years i.e. 439 A.H./1047 A.D. The political situation was entirely changed. The Muslim Spain was divided into the following fifteen Petty Kingdoms or Reyes de Taifas of different tribes and amirates:

(1) Banū 'Abbād :- Seville.

(2) Banū Jahwar :- Cordova.

(3) Banū Dhū al-Nūn :- Toledo.

(4) Banū Tujīb :- Bedajoz.

(5) " " :- Almeria and Larda.

(114) Bermhards, E.M, Arabian Spain, London, 1912, pp. 194-5.

(6) Banū Hūd :- Saragossa.

(7) Banū Zīrī :- Granda.

(8) Banū Ḥamūd :- Malaga.

(9) Banū Qāsim :- Turvila.

(10) Banū Birzāl :- Qarmunah.

(11) Banū Baḥris :- Leblah

(12) Banū Mu'azin :- Silves.

(13) Banū Razīn :- Deruqa.

(14) Different amīrs :- Denia & Mercia.

(15) " " :- Valencia.

AL-BĀJĪ'S POLITICAL ROLE :

We do not find the details of al-Bājī's political activities in the historical and biographical works. They simply mention his role very briefly, Ibn Farḥūn says:

و كان يستعمله الروساء فى الرسل بينهم و يقبل جوائزهم
و هم له على غاية البر و الاكرام .

"The tribal chiefs used him (al-Bājī) for the (Political) negotiations between them and he used to accept their gifts as he commanded their honour and respect."(115)

The statement of al-Maqqarī, throws some more light on al-Bājī's political role and reads:

و لما قدم (الباجى) من المشرق الى الاندلس بعد ثلاثة عاما وجد
ملوك الطوائف احزابا مفترقة فمشى بينهم فى الصلح وهم يجلونه فى
الظاهر و يستثقلونه فى الباطن و يستبردون نزعه و لم يفد شيئا
فا الله تعالى يجاذيه عن نيته —

(115) Ibn Farḥūn, ~~Dibaj al-Mudhdhahab~~ Dībāj al-Mudhahhab, Cairo, 1357 A.H, P. 120.

"When al-Bājī reached Spain from the east after thirteen years, he found the petty kings divided in groups strifing with eachother. He then tried to make compromise between them. They (Kings) were kind and polite to him externally, internally they were very unfair and thus they cooled down his endeavour (to finish their strifes) and nothing could comeout of his effort. But Allāh the Almighty will indeed reward al-Bājī's intention." (116)

From these statements we arrive at the following conclusions;

(i) The Petty Kings of Spain had confidence in Abū al-Walīd al-Bājī.

(ii) They were divided in political groups.

(iii) They used al-Bājī to bridge the political gulf between them.

(iv) In diplomatic negotiations each of them tried to prove himself innocent and just on his stand, desirious of solving his disputes with others. But internally every king was jealous of his opponent trying to mould the situation into his favour through al-Bājī.

(v) Thus, they nullified the mission of Abū al-Walīd al-Bājī. Al-Bājī's political activities as a matter of fact started at the time he entered into the service of al-Muqtadir (d. 474/1081), the Hudite Ruler of Saragossa. Al-Maqqarī states;

ثم استدعاه المقتدر بالله فصار اليه مرتاحا و بدا بافقه
ملتاحا و هناك ظهرت تواليفه و أوضاعه و بدا و خده في سبل
الهدى و ايضاعه و كان المقتدر يباهي بانحياشه الى
سلطانه و ايثاره لحضرته باستيطانه و يحتفل فيما يرتبه له و يجريه و ينزله في مكانه
متى كان يوافيه.

(116) Al-Maqqarī, Nafh al-Tīb, Cairo, 1302 A.H. Vol, I, p. 358.

Then al-Muqtadir bi-Allāh invited him. He lived with him at ease and in his horizon his virtues shone forth, his books and methods became prominent, his swiftness on the ways of guidance was manifested. Al-Muqtadir was proud of having him in his court, preferring him to others and was giving him full facilities. At the time of his arrival in the court, al-Muqtadir paid him great respect and gave him a distinguished place." (117)

Al-Bājī's political activities cannot be determined unless one has a clear picture of the disputes and strifes of the petty kings. Some important disputes and events are therefore mentioned here :-

(1) In the last days of Umayyid rule al-Mundhir Manṣūr Yaḥyā al-Tujībī (d. 414/1023) was the Governor of Saragossa who in 410 A.H./1019 A.D. declared its independence and thus founded "tujibite dynasty". In 431 A.H., 1039 A.D., Sulaymān, a Governor of a neighbouring province attacked Saragossa and founded the Hudite Kingdom. His son al-Muqtadir (rule, 438/ 46 to 474/1082) invited al-Bājī to his court considering him not only a great jurist and theologian but also a wise and noble member or Tujib family whose grandfather Sa'd was an Ambassedor and good diplomat. Al-Bājī undoubtedly tried to settle the political disputes of al-Muqtadir and the disputes of other Kings as well.

(2) Al-Muqtadir (d. 474/1081) was always afraid of Yūsuf al-Tujībī, the former ruler of Saragossa, who had established his amirate in Larda and was preparing himself to take back his Kingdom. He therefore concluded military pacts with his neighbouring Christian States of France and

(117) Ibid, I : 357.

Bercelona. They, without missing the golden chance of dividing and destroying the Spanish Muslim, sent their troops to Saragossa and promised all sorts of assistance.

Knowing this, Yūsuf al-Tujībī came out with a huge army, blocked all the roots and besieged Saragossa city in 443 A.H./1051 A.D. (118) Al-Muqtadir inspite of the Christian troops seemed helpless. But Yūsuf al-Tujībī fortifying all his defensive positions and winning all sorts of favour of the local (tujibites) population, however, gave up the siege and went back without any battle. Historians do not mention the reason of his withdrawal.

(3) Muzaffar al-Tujībī (rule, 424/1033 to 460/1068), the King of Bedajoz, cut off his diplomatic relations with his neighbour state. Seville. The main cause of their strife was that Ibn 'Abbād the King of Seville, had helped Ibn al-Tujībī, the ruler of Valencia against Muzaffar al-Tujībī. This strife lateron resulted in some battles between the two kings (of Bedajoze and Seville) in 443 A.H., 1051 A.D.) (119)

(4) We also find the Muslim ruler of Toledo, Cordova and Seville combating with each other. 'Abd al-Mālik (rule, 450 to 461 A.H.), the ruler of Cordova, contrary to his predesessors, was a man of bad habits and was not liked by his people. King of Toledo taking the advantage

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(118) Ibn Khaldūn, Tārīkh, Vol IV, p. 163-4.

(119) Ibid, Vol, IV, p. 180.

MUSLIM SPAIN OF 5TH CENTURY SHOWING PETTY KINGDOMS REYES DE TAIFAS DURING AL-BĀJĪ'S PERIOD.

(1)	Saragossa, Banū Tujīb & Banū Hud.	(9)	Cordora, Banū Jahwar.
(2)	Deruca, Banū Razīn.	(10)	Malaga, Banū Hamud.
(3)	Valencia, Small Amirids.	(11)	Jerez, Banū Birzil.
(4)	Cuenca, Banu Qasim.	(12)	Swille, Banū Abbad.
(5)	Toledo , Banū Dhū al-Nūn.	(13)	Huela, Banū Bahris.
(6)	Dania, Small Amirites.	(14)	Silves, Banū Mu'azin.
(7)	Lorca, Banū Tujīb & Smādih	(15)	Bedajoz, Banū Tujīb.
(8)	Granda, Banū Zīrī.		

of the situation attacked and besieged Cordova. Ibn 'Abbād , the King of Seville (rule 434/1042 to 461/1068), also joined them but no battle was fought.(129)

(5) The amirates of al-Tujīb tribe were not united. Al-Muzaffar, King of Bedajoz, had some strifes with the Tujibite ruler of Valencia and they also faught between themselves.

(6) Small Kings like Muhammad b. 'Abd Allāh al-Barzalī of Qarmūnah, Ḥamūd, Ruler of Jaysar, Badīs b. Ḥabūs, King of Granda, and others were petty neighbours of Seville and had a number of battles with this state. Ibn Khaldūn thus has rightly observed that these Rulers externally were under the pressure of their big neighbour, Seville but internally they were making alliances with the Christian states to save their petty Kingdoms.

Al-Bājī perhaps tried his level best to unite the petty Kings of Spain so that a strong Muslim Centre may be established in the Peninsula. But al-Maqqarī, as we have stated earlier, has rightly observed that the petty Kings cooled down his effort (mission) and nothing was achieved; و يستردون نزعته و لم يفد شيأ

Another tragic event, which proved more disappointing to al-Bājī, was that when in 456 A.H., 1064 A.D. al-Muqtadir, the Ruler of Saragossa (of which he was the chief judge), was entangled with Muslim kings (and al-Bājī was trying to compromise). The Christian Ruler.

(120) Ibid, Ī : 860.

Arvesh attacked Berbister, a city near Saragossa. Al-Muqtadir could not pay his full attention and entered the city. About one lac muslims were slaughtered and their houses were looted and burnt. Despaired of the political sitution, al-Bājī left Saragossa.

VII - AL - BAJI'S LAST DAYS.

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S E T T L E S   I N   A L M E R I A :

Abu al-Walid al-Baji passed his last days in Almeria — a beautiful city and an important port on the East Spanish Peninsula.(121) Al-Baji chose this place perhaps for the fact that a petty tujibites dynasty ruled over it. Moreover, it had developed into a rendezvous of scholars and intellectuals.(122) The date of his arrival at al-Mariah can easily be determined by the following statement of Qadi 'Iyad:

انه رحل الى ابى الوليد الباجى سنة تسع و ستين و اربع مئة و صحبه بسر قسطه ثم سافر معه الى المريه حتى مات ابو الوليد فكانت صحبه له نحو اربعة اعوام

"He (Qadi Muhammad b. 'Abd al-Rahman better known as Ibn Shirbin) went to Abu al-Walid al-Baji in 469 A.H. and stayed with him at Saragossa. He then travelled to Almeria till the latter died after they had lived together for four years".(123)

D E A T H :

About al-Baji's death Ibn Bashkuwal (d.578 A.H.), says:

و قرأت بخط القاضى محمد بن ابى الخير شيخنا رحمه الله قال توفى القاضى ابو الوليد بالمريه ليلة الخميس بين العشائين و هى ليلة خالية من رجب و دفن يوم الخميس بعد صلاة العصر اربع و سبعين و أربع مئة و دفن بالرباط على ضفة البحر و صلى عليه ابنه ابو القاسم .

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(121) 'Abd Allah 'Annan, Athar al-Andalusiyah al-Baqiyah, Cairo, 1375/1956, p. 192.

(122) Ibid. p.156

(123) Qadi 'Iyad, Azhar al-Riyad, Cairo, 1359/1940, Vol. III./

"I have read in the handwriting of our Shaikh Qāḍī Muhammad b. Abū al-Khayr (Allah may bless him), he says; Qāḍī Abū al-Walīd died in Almeria on the night of Thursday between two 'Ishā prayers (maghrib and 'ishā) the last night of the month of Rajab and was buried in Rabāṭ on the sea-shore on Thursady in 474 (124) A.H. His Janāzah prayer was led by his son Abū al-Qāsim."

Ibn Khallikān (6. 81. A.H.) however, states as follows;

و توفى بالمرية ليلة الخميس بين العشائين تاسعة عشرة رجب سنـــة
اربع و سبعين و اربعمائة ــ و دفن بالرباط على ضفة البحر و صلى
عليه ابنه ابو القاســم ــ

"He died at Almeria between Maghrib and 'Ishā prayers the night of the 19th Rajab 474 A.H. and was buried in Rabāṭ on the sea-shore. His janazah prayer was led by his son al-Qāsim. (125)

But al-Kutubī (d. 464 A.H.) and Ibn Farḥūn (d. 799 A.H.) amongst the later authorities are of opinion that al-Bājī died in 494 A.H./1101 A.D. (126) This date cannot be considered correct for the following reasons;-

(i) Al-Kutubī's Fuwāt al-Wafayāt, is in fact an appendix of the Wafayāt al-A'yān of Ibn Khallikān. The year of al-Bājī's death according to him (Ibn Khallikān) is 474. The chnge of illustration in the original text thus does not seem logical.

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(124) Ibn Bashkuwal, K. al-Ṣilah , Cairo, 1374/1955, Vol, I , p. 199.

(125) Ibn Khallikān, Wafayāt al-A'yān, Cairo, 1367/1948, Vol. II, p. 142

(ii) The editor of _Fuwat al-Wafayat_, Muhammad Muhiyyuddin 'Abd al-Hamid differs from the statement of al-Kutubi and prefers the date of al-Baji 's death 474 A.H. (127)

(iii) Al-Baji's son Ahmad Abu al-Qasim died in 493 A.H. (128) It has been established earlier that Ahmad Abu 'al-Qasim led the janazah prayer of his father and worked as teacher in his place.

Al-Maqqari ~~pr[illegible]~~ (d. 1041 A.H./1632 A.D) summing up the statement of his predesessors says:

و توفى فى المريه لاحدى عشر بقيت من رجب و قيل ليلة الخميس
تاسع رجب و قيل تاسع عشر صفر سنة اربع و سبعين و اربعمائة

"He died in Almeria on the 19th of Rajab. It is said that he died in the night of Thursday. It is also said that he died on 19th of Safar in 474 A.H. (129)

It seems therefore definite that al-Baji died in 474 A.H./1082 A.D. which is further confirmed by the authorities of the later period.

C H I L D R E N :

As stated by the biographers al-Baji had three male children. His two sons, whom he loved very much, died before him. Their ages and the place of their death are not determined, but the verses written on their elegy indicate that they were adolescent and young. (130)

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(127) _Ibid_.

(128) Ibn Bashkuwal, _K. al-Silah_, Cairo, 1374/1955, Vol, I, pp. 73-4.

(129) Al-Maqqari, _Nafh al-Tib_, Cairo, 1302 A.H., Vol I,/ p. 358.

(130) Ibn Khaqan in his book, _Qala'id al'Iqyan_, mentions these elegies with the remarks:

له يرثى ابنه وكانا مختر بين وشركوكبين وكانا ناظرى الدهر وساحرى
النظم و النثر -

(Ibn Khaqan, _Qala'id al-'Iqyan_, Paris, 1860 A.D., P.216).

His third son Abū al-Qāsim Aḥmad attained some eminence like his father. Ibn Bashkuwāl states in his al-Ṣilah:

روى عن أبيه معظم روايته و تواليفه و خلف اباه في حلقته بعد وفاته
و اخذ عنه اصحاب ابيه بعده ــ و اخذ بقرطبه عن حاتم بن محمد
العقيلي و ابن حيان و كان فاضلا دينا من انهم الناس و اعلمهم ...
اخبرنا عنه غير واحد من شيوخنا و وصفوه بالنباهة و الجلالة و رحــل
الى المشرق و حج و توفى بجدة منصرفه من الحج سنة ٤٩٣ ــ

"He narrates from his father (al-Bājī), most of his narrations and aḥādīth and his books. He succeeded his father in his dars and the pupils of al-Bājī studied with him afterwards. He also learned from Ḥātim Ibn Muḥammad al-'Uqaylī and Ibn Ḥayyān in Cordova. He excelled in faith and learning and was most learned and intelligent of the scholars .....Many of our authorities have praised his sagacity and dignity. He travelled to the east and performed Hajj and died at Jedda while returning from his Hajj in 493 A.H. (131)

Ibn Farḥūn gives more details about him and says:

كان ابو القاسم من اهل الدين و الفضل غلب عليه علم الاصول و الاخلاف
تفقه على ابيه و خلفه في حلقته بعد وفاته و أخذ عنه اجلة من اصحــاب
أبيه كابي على الصدفي ــ و حدث عنه الجياني و اذن له ابوه في اصلاح
كتبه في الاصول فتبعها و ألف كتابه معيار النظر و كتاب سر النظر و كتاب
البرهان على ان اول الواجبات الايمان و تخلى عن تركة أبيه و كانت واسعة
و رحل الى المشرق و دخل بغداد فاقام بها سنتين أو نحوهما ثم تحول
الى البصره ثم استقر في بعض جزائر اليمن ثم حج فمات بجدة بعد منصرفه من
الحج في ثلاث و تسعين و اربعمائة .

(131) Ibn Bashkuwāl, K. al-Ṣilah, Vol. I, pp. 73-4.

"Abū al-Qāsim was a man of faith and excellence. He was interested in the principles of jurisprudence which he studied with his father and succeeded him in the Madrasah after his death. His father's prominent students like al-Ṣadafī studied with him al-Jiyānī (a great muhaddith) also narrated from him. Al-Bājī permitted his son to edit his books on principles of jurisprudence. Abū al-Qāsim followed these works and then wrote his own books (i) Mi'yār al-Naẓr , (ii) Kitāb Sirr al-Naẓr and (iii) Kitāb al-Burhān. He took nothing from the property left by his father, as he was generous. And he travelled to the east and entered Baghdād where he stayed for about two years. He then proceeded to Baṣrah and lastly to some islands of al-Yaman where he settled down. Then he performed Hajj and on his return he died at Jeddah in 493 A.H./1100 A.D."(132)

Kaḥḥālah on the authority of Ḥājī Khalīfah and al-Ṣadafī has recorded the same about al-Bājī's son Aḥmad Abū al-Qāsim.(133)

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(132) Ibn Farḥūn, Dībāj al-Mudhdhahab, p. 40.

(133) Kaḥḥālah, Mu'jam al-Muwwalifīn, Damascus, 1374/1957, Vol, I , p. 237.

(B) JURISPRUDENCE AND JUDICIARY IN SPAIN

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I. USUL AL-FIQH OR THE PRINCIPLES OF LAW

MEANING OF JURISPRUDENCE :

Man being a social creature needs a society which develops a 'rule of conduct' for its organziation and administration. This rule of conduct distinguishes the just action from the unjust ones. Whether the actions relate to one invidivual or more or belong to one community or a number of communities these are regulated by any one of the following rules of conduct;

(i) The Moral Law or the rule of natural right and wrong.

(ii) The Physical Law or the expression of uniformities of nature.

(iii) The Conventional Law or the rule agreed upon by the persons to regulate their conducts towards each other.

(iv) The Customary Law or the rule which the persons have set for themselves and to which they voluntarily conform their actions.

(v) The Technical Law or the rule which fulfils certain purpose in order to attain a certain end.

(vi) The Imperative Law or a rule imposed upon individuals by some authority which enforces obedience to it.

(vii) The Civil Law or the rule of the land and the state.

(viii) The International Law or the rule of the nations.

Ass such rules of conducts are generally known as 'Law', Lex and Jus or Juris in latin, Figh in Arabic, droit and loi in French and recht or geset in German, which exists in society either in a concrete form or in an abstract shape.

The study of law is known ' the General Law' and technically termed as Jurisprudence. The work jurisprudence is the composition of two Latin words; Jus or Juris i.e. law, and prudentia i.e. knowledge or science. In a generic and primary sense, words Jus and lex bear the meaning of 'Law' but their tropical or secondary use draws a distinctive line between these terms. Thus the central idea of juridical theory is not lex, but Jus.(1) Jurisprudence, therefore is "the knowledge or skill in law, the science which treats of human law in general, the philosophy of law."(2)

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(1) Blanville Williams, Jurisprudence, London, 1957, p.30.

(2) Oxford English Dictionary (Shorter, ed), Oxford, 1952, pp. 1074-5.

The analystical study of the legal expositions (whether existing or non-existing) legal sources scientific divisions of law legal history and the methods of legislation, provides the data for legal theory, legal concept or the principles of Law.

THE MUSLIM LAW OR FIQH :

Law has been Islam's primary expression of faith; the relationship of a Muslim to his community is determined by his affiliation with one of the recognized school of law. In a sense, Islam has got its own statutes, legal sources with their scientific divisions, methods of legislation and a vast legal history. Muslim Jurisprudence is, therefore, science of "the roots of Muslim Law" generally known as Uṣūl al-Fiqh.

In al-Qur'ān as well as in al-Hadīth (the first and basic sources of Muslim Law) the word Fiqh has been used frequently, not in its technical sense, but in the sense of 'understanding', and 'realisation'. The Qur'ānic verses قد فصلنا الآيات لقوم يفقهون , "We have detailed our revelations for a people who have understanding",(3) and ليتفقهوا فى الدين that they may gain understanding in al-Dīn (4), indicating the same sense. A well known ḥadīth من يرد الله به خيرا يفقهه فى الدين whomsoever Almighty Allāh intends to do good, He makes him capable of understanding al-Dīn",(5) also bears the same sense of 'understanding'. The Holy Prophet (may peace be upon him)

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(3) Al-Qur'ān,

(4) Ibid,

(5) Mishkāt al-Maṣābīḥ, Delhi, 1350/1932, p.32.

blessing Ibn 'Abbās used the word Fiqh saying, اللهم فقهه في الدين "O God give him understanding in the Religion".(6) Once some bedouin requested the Holy Prophet for deputing someone to their tribe " so that we (they) may understand the Religion, (al-Dīn) from them, ليتفقهو منا فى الـــدين ".(7)

All these or such Qur'ānic verses and narrations of aḥādīth are the examples where Fiqh connotes the meaning of "understanding" especially "the understanding of the Religion or al-Dīn."

For understanding of general subjects (including al-Dīn), the word 'Ilm has been used in al-Qur'ān and ḥadīth literature. The very first revealation begins with the massage of 'Ilm اقرأ وربك الاكرم الذى علم بالقلم علم الانسان مالم يعلم "Read ! And thy Lord is most Generous, Who taught man by the Pen, Taught man what he knew not";(8) and such other Qura'nic verses use the word 'Ilm in the sense of "general understanding (of things) or their knowledge.(9) Numerous aḥādīth in the chapter of the Knowledge (Bāb al-'Ilm) are explicitly used in the same sense. Ḥadīth اطلبوا العلم من المهد الى اللحد "Acquire 'Ilm (Knowledge) from the cradle to the grave."(10)

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(6) Ibid,

(7) Ibid,

(8) Al-Qur'ān, 96 ; 4-5

(9) Ibid, 2; 32. وعلم آدم الاسماء كلها

(10) Mishkāt al-Maṣābīh, Delhi, 1350/1932,

and hadith اطلبوا العلم و لوكان بالصين , "Acquire 'Ilm (Knowledge) evein if it to be obtained from China"(11) are two example of the sense.

The distinction between 'Ilm and "Fiqh", as observed in the above discussion, is that Fiqh may be called 'Ilm, but 'Ilm may not be termed as Fiqh. For the scholorship of 'Umar two separate words Fiqh and 'Ilm have been used in a report which shows that the Fuqaha', did not dare speak in the presence of 'Umar, the second caliph, because of his domination on them by virtue of his "Fiqh" and 'Ilm".(12) Legal vardicts (Fatawa) of the judges were commonly called Fiqh (of those judges). 'Umar once in his speech at Jabiyah said, "Let him who desires to seek Fiqh go to Mu'adh b. Jabal (d. I.8. A.H.)(13)

U S U L A L- F I Q H O R P R I N C I P L E S O F M U S L I M L A W:

Legal knowledge of the Shari'ah is composed of two parts:-

(i) Usul, and .

(ii) Furu'

Asl (Pl. usul) literally means root, origin and principles Far' (Pl. Furu') is the consequence of a principle or a branch of a root. The whole Muslim Law with all its details relating to Yajuzu wama la Yajuz

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(11) Ibid , p.

(12) Ibn Sa'd, al-Tabaqat al-Kubra, Bariut, (1957, 1377/ Vol, II, p. 336,

(13) Ibid, Vol, II, p.

(legality or illegality) deals with Furu' and is termed al-Fiqh, the law. And all the basic concepts and theories relating to these Furu' (of Muslim Law) deal with usul and is thus called usul al-Fiqh or the Principles of Muslim Law.

Imam Abu Ishaq al-Shirazi (d. 476 A.H.) in his Book al-Luma' defines the terms as follows:

الفقه معرفة الاحكام الشرعيه التى طريقها الاجتهاد ....
واما اصول الفقه فهى الادلة التى يبنى عليه الفقـــه

"Al-Fiqh is the knowledge of the Laws of Shari'ah, the method of which is the individual reasoning; whereas, Usul al-Fiqh are the indications on which al-Fiqh (i.e. Shari'ah Law) is based." (14)

Muhammad al-'Amidi (d. 631 A.H.), elaborates the terms and defines the technical meaning of al-Fiqh saying:

الفقة مخصوص بالعلم الحاصل بجملة من الاحكام الشرعية الفروعية
بالنظـــــر و الاستدلال

"Al-Fiqh precisely means a thorough knowledge of the particular decisions of the Shari'ah obtained by insight and reasoning." (15)

"Usul al-Fiqh" he says, are the principles of Fiqh, which encompass Shari'ah laws within their dimensions; the nature of this encompassment is brevity and not in detail." (16)

فاصول هى ادلة الفقه و جهات دلالاتها على الاحكام الشرعيه —
وكيفية حال المستدل بها من جهة الجملة — لا من جهة التفصيل —

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(14) Abu Ishaq al-Shirazi, K. al.Lum'a, Cairo 1325 A.H. p.20.

(15) Muhammad al-'Amidi, al-Ahkam fi usul al-Ahkam, Cairo, 1332/1914, Vol, I, P.7.

(16) Ibid, Vol. I, P. 8.

Muhammad Ma'rūf al-Dawālībī, a modern jurist, defines the terms, uṣūl and al-Fiqh, as follows;

أصل الشيء لغة هو ما بنى عليه ذلك الشيء و المراد هنا فى اصطلاح هذا العلم الدليل.... الفقه لغة هو العلم الفهم و المراد به العلم بالاحكام الشرعية –

Philologically, the aṣl is the root of a thing on which it is based. Technically here it means 'the proof'. In the lexicon Al-Fiqh means, the knowledge and the understanding and here it means, ' the science of the Sharī'ah laws." (17)

He then establishes the definition of uṣūl al-Fiqh and says;

هو العلم الباحث فى ادلة الاحكام الشرعيه و فى وجوه دلالتها على تلك الاحكام .

"Uṣūl al-Fiqh is a science that deals with the evidences of the Sharī'ah laws and effective causes of the formation of these laws." (18)

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(17) Muhammad al-Ma'rūf , al-Madkhal ilā 'ilm uṣūl al-Fiqh, Damascus, 1374/1955, p.11.

(18) Ibid, p. 12.

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II. THE EARLY PHASE OF THE MUSLIM JURISPRUDENCE.

LEGAL STRUCTURE DURING THE TIME OF THE HOLY PROPHET :

THE REVELATION OR AL-KITĀB : The Holy Prophet was asked to decide the matters in accordance with the revelation of Almighty Allāh, "Lo ! We revealed unto thee the Scripture with the truth, that thou mayst judge between mankind by what Allah showeth thee"; (19) "He was then asked, "not to be a pleader for the treacherous," (20) and "Judge between them by that which Allāh hath revealed, and follow not their desires away from the truth which hath come unto thee." (21)

These Qur'ānic injunctions indivate the fact that al-Kitāb (the revelation) was considered the main and original sources of Law, even the Prophet was to follow it strictly.

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(19) Al-Qur'ān, 4; 105;

انا انزلنا اليك الكتب بالحق لتحكم بين الناس بما أراك الله

(20) Ibid,

فلا تكن للخائنين خصيما

(21) Ibid, 5; 484;

فاحكم بينهم بما انزل الله و لا تتبع اهواءهم عما جاءك من الحق .

<u>THE PROPHETIC SUNNAH :</u> The revelation or <u>al-Kitāb</u> was the fundamental source of legislation which was explained to the mankind through the life and conduct of the Holy Prophet. Thus whenever the Holy Qur'ān asks the believers to obey Allāh's commandments, it also instructs them to follow the Prophet; "Obey Allāh and obey the Messenger,"(22) "But Nay, by thy Lord, they will not believe untill they make thee judge what is in dispute between them,"(23) and whosoever obey the Messenger, obeyth Allāh."(24)

This is because the believers have in the Prophet of Allāh an excellent model.(25) لقد كان لكم فى رسول الله اسوة حسنة

And it became the binding upon the believers that:

ماكان لمومن ولالمومنة اذ قضى الله و رسوله امرا ان يكون لهم الخيرة من امرهم و من يعصى الله و رسوله فقد ضل ضلالا مبينا

"And it becometh not a believing man or a believing woman, when Allāh and his messenger have decided an affair (for them) that they should claim any say in their affair, and whosoever is rebellious to Allāh and His messenger, he verily goeth astray in error mainfest."(26)

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(22) <u>Ibid</u>, 4:59; اطيعوا الله و اطيعوا الرسول

(23) <u>Ibid</u>, 4:65; فلا وربك لايومنون حتى يحكموك فيما شجر بينهم

(24) <u>Ibid</u>, 4: 80; من يطع الرسول فقد اطاع الله

(25) <u>Ibid</u>, 33 : 21,

(26) <u>Ibid</u>, 23:26.

The prophetic conduct (al-sunnah) is therefore strictly followed by the companions and recognized as the basis of Sharīʿah Law. Technically the prophetic Sunnah comprised the actions (afʼāl), the expressions (aqwāl), and the approvals (Taqrīrāt) of the Holy Prophet.

LOCAL CUSTOMS AND USAGES OR ʿURF, TAʿĀMUL AND ʼADAH : Islam claims that its message is not novel, It conveys the message of Abraham, the great ancestor of two holy lands, the Land of Bayt al-Lahm in Jeurusalem and the Land of Bayt Allāh in Mecca. It is "the faith of your father Ibrahim. He hath named you Muslims."(27)

The local custom and usages of these areas were more or less sanctified by Prophet Ibrahīm and practised by his descendants. But his message was changed and corrupted at a later stage. The Holy Prophet thus adopted good customs making them al-Sunnah and discarded those which were harmful to the society.

A brief account of the Arabian customs of both types are given below:-

(1) FAMILY LAW : In family laws the customs of Khiṭbah i.e. negotiation for marriage engagment, Mahr i.e. Dower, Nikāḥ i.e. marriage contract Ṭalaq i.e. dissolution of marriage by husband, Khulaʿ, i.e. dissolution of marriage by wife, Ẓihār i.e. dissolution

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(27) Al-Qurʼān , 22:78.
ملة ابيكم ابراهيم هو سمكم المسلمين

of marriage by the husband by saying the words,"the back of his wife resembled the back of his mother". 'Īlā, i.e. dissolution of marriage by the husband by swearing that he would have nothing to do with his wife, which were in vogue in Arabia, were retained by Islam. Similarly after the Divorce, the 'Iddah i.e. waiting - period was strictly observed. Marriages in the shape of Mut'a i.e. temporary marriage, Shighār i.e. giving one's daughter or sister in marriage to another man in consideration of the latter giving his daughter or sister in marriage to the former, and Kathrat al-Izdiwāj i.e. polygamy or marrying more than one wife, which were recognized institutions in the Arab society, were also retained by the Qur'ān or Sunnah.

(2) TRADE LAW: In trade law too, several forms of sales were already established as customs. For instance (i) Muqāyada i.e. sale of goods for goods or barter system, (ii) Bay' i.e. sale of goods for money, (iii) Ṣarf i.e. sale of money for money, (iv) Salam i.e. sale in which the price is paid in advance, (v) Murābaḥa i.e. sale at the cost price, (vi) Waḍī' i.e. sale at less than cost price, (vii) Bay' bi ilqā' al-Ḥajr i.e. sale by throwing a stone (articles of sale were exposed, the buyer threw a stone and whichever article it hit, became the property of the buyer), (viii) Mulāmasah i.e. sale by touching the goods, (ix) Munābazah i.e. sale in which the article is thrown to the buyer indicating the completion of the sale,

(x) Muzanabah i.e. sale of dates on tree, (xi) Muhaqalah i.e. sale of wheat as standing crops, (xii) Bay'al-wafa' i.e. sale of article by saying to the buyer, "I sell you for the debt which I owe you on the condition that when I repay the debt you will give back the article to me", the article thus could not be used without vendor's permission, (xiii) 'Arbun i.e. sale of articles by depositing a portion of price on the approval by the purchaser and payment of the balance within a stipulated period, failing which the transaction may be cancelled and the amount deposited may be forfeited, etc, etc.

(3) AGRICULTURAL LEASES : In agricultural lease rent was paid either in money or a part of the produce or wheat. If the supply of seed and other expenses for cultivation were the lessor's responsibility, the lease was termed Mukhabarah. If these expenses were born by the Lessee it was called Muzara'ah . Leases of fruit gardens for a stipulated period were also executed and known as Musaqat.

(4) LOAN TRANSACTIONS: Some institutions for advancing loans were also established. These loans were of various nature such as Riba' i.e. usury, Qard i.e. loan without profit, and 'Ariyah i.e. loan of money or articles temporarily to be returned to the donor, free of interest.

(5) PENAL LAWS: In penal laws punishments of Jaldah i.e. flogging , Qat'a yadd i.e. cutting of hands, Rajm

i.e. stoning, Qisas i.e. death for murder, eye for eye, and so on, Diyat i.e. compensation to the heirs of the murdered in place of death penalty, with the consant of the heirs were also of pre-Islamic origin.

(6) JUDICIAL PROCEDURE: In the procedure of dispensing justice, the practice of Shahadah i.e. witness, Qasm i.e. oath, Hakam i.e. arbitrator, etc, were also found in different forms.

An analytical study of Islamic Law of the later period indicates that the local customs and usages of the people of the conquered lands were accepted and incorporated in the Islamic law provided these were not against Qur'an and Sunnah. Such other customs and usages as were incompatible with the social strucutre of Islam, were either totally rejected or adopted with the modifications according to the Qur'an and Sunnah. On this issue Imam Abu Yusuf's opinion is given below:-

و قال ابو يوسف: اذا كانت فى بلاد سنة اعجمية قديمة لم يغيرها الاسلام لم يبطلها فشكاها قوم الى الامام لما ينالهم من مضرتها فليس له ان يغيرها

"Ancient non 'Arab ('ajami) customs, if not repugnant to the Shari'ah (Qur'an and al-Sunnah), would not be rejected by the Muslim state."(28)

Imam Sarakhsi (d. 483 A.H.) discussing on al-'Urf i.e. usages, says:

فاذا كان ذلك معروفا بينهم فالثابت بالعرف كالثابت بالنص

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(28) Al-Baladhari, Futuh al-Buldan, Cairo, 1350/1932, p. 435.

"If a custom is well known and established among the people (not repugnant to Qur'ān and Sunnah) it is as valid as Naṣṣ."[29]

<u>REASONING AND IJTIHAD:</u> Personal reasoning and analogical deductions are allowed by al-Qur'ān. The Qur'ānic verse;

"for each one of your we have made a path (Shar') and a method (minhāj),"[30] supports this contention.

The Holy Prophet on various occasions relied on the decision of his reason. Once the Prophet was asked by a person whose father had died without performing the Ḥajj, whether it was necessary for him (son) that he should perform the Ḥajj on behalf of his deceased father for the salvation of his father's soul. The Prophet put a counter question said, "What do you think you would have done, had your father died with a debt against him".[31] The Prophet naturally wanted the person concerned to pay the debt of his father in the first instance and then perform Ḥajj for the deceased provided the deceased was wealthy.

On the occasion when Mu'ādh (a famous companion) was sent to the Yeman as Governor, the Prophet (may peace be upon him) asked him;

كيف تقضى اذا عرض لك القضا؟

"According to what should you judge? "

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(29) Sarkhasi, <u>Sharh al-Siyar al-Kabir</u>, Hyderabad (Deccan), 1335 A.H. Vol, I p. 194.

(30) Al-Qur'ān, 5:48.

(31) <u>Mishkāt al-Maṣabiḥ</u>, Damascus , 1380/1962.

Mu'adh replied;

بكتاب الله "According to the Book of the God (al-Qur'an)".

"And if you find nothing therein?"

The reply was, " فسنة رسول الله

i.e. according to the tradition of the Messenger of God (al-Sunnah)".

"And if you find nothing therein?" اجتهد برأى

"I shall interpret with my reason", was his answer.

And thereupon the Prophet said;

الحمد لله الذى وفق رسول الله لما يرضى رسول الله

"Praise be to God who has favoured the messenger of His Messenger with what His Messenger is willing to approve." (32)

The dialogue indicates that the Holy Prophet permitted reasoning lost of all. We find numerous other instances which indicate that the companions (Sahabah) used reasoning as the source of law in the absence of Nass.

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(32) Abu Dawud, al-Sunan, Kanpur, 1345 A.H., Vol. II p.149;

حفص بن عمر عن شعبه ... ان رسول الله صلى الله عليه و سلم
لما اراد ان يبعث معاذ الى اليمن قال كيف تقضى اذا عرض لك القضاء
قال أقضى بكتاب الله قال فان لم تجد فى كتاب الله قال فان لم تجد
فى كتاب الله قال فبسنة رسول الله صلى الله عليه و سلم قال فان
لم تجد فى سنة رسول الله صلى الله عليه و سلم و لا فى كتاب الله
قال اجتهد برائى و لا آلو ـ فضرب رسول الله صلى الله عليه و سلم
صدره فقال الحمد لله الذى وفق رسول رسول الله صلى الله عليه و سلم
لما يرضى رسول الله .

THE LAW (FIQH) DURING THE PERIOD OF SAHABAH

FUNDAMENTAL SOURCES : After the prophet period i.e. 10th Hijra (632 A.D.) there starts the era of the Companions, Sahabah , for whom a narration of the Holy prophet reads; اصحابی کالنجوم بأيهم اقتديتم اهتديتم "My Companions are like the guiding stars, whoever will follow them, will find the right path." (33) This period is also the period of the rightly guided caliphs or Khulafa' al-Rashidun.

Legislation or law-making in this period was based on the same guide-lines which were approved by the law-giver, Sahib al-Shar' : Al-Qur'an and al-Sunnah were regarded as jus sacrum and the gist of all sources, al-Qur'an as the text (Nass) and al-Sunnah as its explantion (Sharh).

CONSULTATION OF CALIPHS OR SHURA AL-KHULAFA : The main and primary method of solving the new sociological problems was al-Shura or consultum. The Caliphs used to consult the respectable members of different classes of people (on important issues). Representatives from the first emigrants al-Muhajerun al-Awwalun, the emigrants al-Muhajirun, the original citizens of al-Madinah,

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(33) Mishkat al-Masabih, Damascus, 1382/1962 ,Vol,III, P.219, This hadith has been narrated by Razin and Considered as Daif'. Another hadith reported by hadrat 'Umar in this connection reads as follows;
وعن عمر بن الخطاب قال: سمعت رسول الله صلى الله عليه وسلم يقول - سألت ربي عن اختلاف اصحابي من بعدي فاوحى الي يا محمد ان اصحابك عندي بمنزلة النجوم في السماء - بعضها اقوى ولكل نور - فمن اخذ بشيء مما هم عليه من اختلافهم فهو عندي على هدى.

al-Anṣār, the great companions, Ajillah Ṣaḥābah, famous tribes of Arabia, Qabāil al-Arab and the jurists, 'al-Fuqahā' etc. Imām Abū Yūsuf has given an account of such consultation. He has for example recorded the shūrā (consultation) of Ḥaḍrat 'Umar before he decided not to distribute the lands of Syria and Iraq along with other war spoils.

Before promulgating his injunction Ḥaḍrat 'Umar consulted the first emigrants (al-muhājirūn al-Awwalūn). Then he called the Anṣār - five from 'Aws and five from al-Khazraj and having consulted these people he decided the case. (34)

When Ḥaḍrat Umar was on his way to Syria and arrived at al-Ṣargh, he was informed of the plague that had broken out in the Muslim camp. After consulting Ḥaḍrat Abū 'Ubaydah, the Commander-in-Chief of the Muslim forces in Syria, and other army chief in the Muslim camp, Ḥaḍrat 'Umar decided to return to Medina. (35)

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(34) Muslim, al-Ṣaḥīḥ, K.al-Salam, Cairo, 1375/1955, Vol, IV p. 740-41.

(35) Ibid, Vol, IV p. 1740 (Chapter 39, Ḥadīth No. 98);
ان عمر بن خطاب خرج الى الشام حتى اذا كان بسرغ لقيه اهل
الاجناد ابوعبيده بن الجراح و اصحابه فاخبروه ان الوباء قد وقع
بالشام فقال عمر: ادع لى المهاجرين الاولين فدعدتهم . فاستشارهم ...
ثم قال : ادع لى الانصار فدعدتهم ، فاستشارهم ... ثم قال: ادع
لى من كان ههنا من مشيخة القريش من مهاجرة الفتح ... الخ

So there are numerous instances which indicate that the Caliphs used to consult the representative of different sections of the cummunity (al-'Ummah) before deciding socio-legal issues. It was a sort of Senatus-Consulta.

DECISIONS OF THE CALIPHS OR AQDIYAH AL-KHULAFA': The Caliphs being 'Uli'l-a'mr or incharge of the affairs of the community, had the power to issue orders, a power implied in the Qur'anic verse; "Obey God, His prophet and those incharge of your affairs".(36)

اطيعوا الله و اطيعوا الرسول و اولى الامر منكم

The orders of the Caliphs, therefore, were "their rulings as well as their "personal reasoning (Ijtihad)" in accordance with the prevailing conditions. For instance forty lashes as punishment for wine-drinking was fixed apprently, bu Abu Bakr and later on increased to eighty lashes by 'Umar and Ali.

These rulings of the Caliphs may, however, be classified into three main categories:-

(i) Decisions made as Head of the state in the capacity of supreme Qadi which may legally be termed as decreta or Qadaya.

(ii) Injunctions or instructions issued to the Governors and other officials in different religio-political or legal matters i.e. Mandata or Ahkam.

(iii) written answers to the questions. submitted to the caliphs either by the officials or by the citizens . These written letters being documents, were very important and called Edicta or Rasa'il and Kutub.

(36) Al-Qur'an, 4; 59.

VERDICTS (ADDIYA) OF THE JUDGES : During this period the Muslim state spread upto Iran, Iraq, Syria, Egypt and areas where the directives of the Caliphs could not reach immediately in time. The judges in these areas decided the cases in the light of the sources of Law, and in their absense they used their own reasoning (Ijitihad). These verdicts of the judges played an important role and became a valuable record for the later jurists, which may legally be termed as Addiyah or Magistratumm Edicta.

JURISTIC OPINIONS OR ARA' AL-FUQAHA': We have mentioned in a preceeding discourse that the Holy Prophet recognized the validity of personal reasoning (Ijtihad) and analogy (Qiyas) in the absence of the explicit text (al-Nass al-Zahir). Qur'anic verses like, "For every one of you we have made a Path and a method",[37] and, "Allah intends for you the ease and does not intend any difficulty for you",[38] support this contention. The companions, therefore, exercised personal reasoning (Ijtihad) and gave their individual views, Responsa Predentiam, on certain legal matters. And so they had difference of opinion in some cases.

On the question of Qar' (monthly cours of a woman), for instance, the jurist Companions held different views.

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(37) Al-Qur'an, 5: 48; لكل جعلنا منكم شرعة و منهاجا

(38) Ibid, 2: 185,
يريد الله بكم اليسر و لا يريد بكم العسر

For determination of the waiting period of a divorced woman the Qur'ānic injunction is , " Women who are divorced shall wait, keeping themselves apart for three qurū'." (39) 'Umar, 'Alī Ibn Ma'sūd and Abū Mūsā al-Ash'arī are reported to have held that qurū' (sing. qar') means, "menstruations" (Ḥayḍ) while 'Ā'ishah, Zayd ibn Thābit and ibn 'Umar are reported to have established that qurū', means " the period of purity between menstruations (aṭhār)".

This difference of juristic explanation of the word qar'ā however, affects the duration of "the waiting peiord" i.e. 'iddah. According to the former view the waiting period of a divorced woman will be completed after the completion of the third monthly course, while according to the latter view this period will be over as soon as the third course starts.

In 'Ibādāt, 'Umar and 'Ammār, for example, differed in a journey, concerning the mode of Tayammum for Janābat , necessitating the major purity i.e. ghusl.

It is, however, clear from the above instances that the difference of opinion among the Companions arose in the details and minute discriptions of 'Ibādāt (worships), Mu'āmalāt (civil law,) and 'Uqūbāt.

A statement of 'Umar II throws light on the validity of such differences :-

"I do not like that the Companions of the Prophet should not disagree, because were there one view only

(39) Ibid, 2: 228. و المطلقات يتربصن بانفسهن ثلثة قروء

the people would have suffered hardship. Surely the Companions are the leaders to be followed. Now, if one follows the view of anyone of them, he follows a desireable view. In other words the Companion opened the gate of making endeavour and allowed disagreement in reasoning. It is sure and certain that had they not kept the door of Ijtihād open the jurists would have been put to great difficulty. Allah, the Almighty, has, therefore, enriched the Ummah with their different views in the details of Law ...."(40)

Professor Ma'ṣūmī, referring to a Qur'ānic verse (i.e. V: 49), has rightly observed that: "the beleivers are therefore, at liberty to adopt most useful and easeist possible way to practise the teachings of Islam and to popularise them among mankind for their betterment."(41)

Summing up it can be said that during the period of Ṣaḥābah, the Book of Allāh (al-Qur'ān) and the Prophetic Sunnah were explained through Shūrā' (Senatus consulta), decisions of al-Khulafā' (Caliphic Mandata), Naẓā'ir al-Qaḍāyā (Magistratum Edicta), and Ārā al-Fuqahā (Responsa Prudentium).

APPEARANCE OF LAW SCHOOLS:

During the caliphate period owing to territorial conquests on the expansion of the Islamic state, the

(40) Al-Shāṭibī, Al-I'tiṣām, Cairo, 1332 A.H, Vol, III p. 11; the statement reads:
ما احب ان اصحاب محمد صلى الله عليه وسلم لا يختلفون لانه لو كان قولا واحدا لكان الناس في ضيق ......

1391/1971.

(41) Ma'ṣūmī, S.H. Ikhtilāf al-Fuqahā', Vol. I, p. 2, Islamabad

jurist companions (Ṣaḥābah) and their successors (Tābi'īn) spread in different regions. These learned people naturally had to take the responsibility of administrators, judges and theologians in their respective regions. Dealing with the daily administrative problems, judicial verdicts in personal laws and rational explanations of the Muslim doctrines they came across with the customs, private law (Jus Privatum) as well as the public Law (Jus Publicum) of their respective regions. So, in different socio-geographical situations they endeavoured to solve their day to day problems in accordance with the Sharī'ah Laws. Same were the difficulties of the Tābi'ī Jurists who followed them and tackled their problems in accordance with the injunctions of al-Qur'ān and al-Sunnah and the Ijtihād of the Ṣaḥābah. The jurists of this period were also required to give preference (tarjīḥ) to one and a particular ḥadīth out of different kind of aḥādīth (traditions), just to assist them in their Ijtihād (individual reasoning) and Qiyās (analogy), in Istiṣḥāb al-Ḥāl (in commensurate with the situation) and Maṣāliḥ Mursalah (the intended welfare of the community).

The Muslim jurists of this period may be devided into the following three, "Regional Schools of Law".

<u>HEJAZI SCHOOL :</u> Mecca and Medina, being sacred places, were the great seats of learning. This jurist of these cities and their surrounding areas formed the Hejazi School of Law:

Among the Meccans the following jurists are famous:-

(1) 'Aṭā ibn Abī Rabāḥ (d- 114 A.H.) ;

(2) ʿAmr ibn Dīnār, (d- 126 A.H.).

Among the Medenites the following jurists are very famous.

(3) ʿUrwah ibn Zubayr(d. 93, or 94 A.H.);

(4) Saʿīd ibn al-Mussayib (d. ca, 94, A.H.)

(5) Abū Bakr ibn 'Abd al-Raḥmān (d. 94, 95 A.H.)

(6) ʿUbayd Allāh ibn 'Abd Allāh (d. 98, A.H.);

(7) <u>Kh</u>ārijah ibn Zayd (d. 99 A.H.);

(8) Sulaymān ibn Yasār (d. ca, 107 A.H.);

(9) Al-Qāsim ibn Muḥammad, (d. 107 A.H.);

These jurists are generally known as, "the seven jurists of Medina." Beside them the following are also known;

(10) Sālim ibn 'Abd Allāh ibn 'Umar (d. 106 A.H.) ;

(11) Ibn <u>Sh</u>ihāb al-Zuhrī (d. 124 A.H.) ;

(12) Rabī'ah ibn 'Alī 'Abd al-Raḥmān (d. 136 A.H.);

(13) Yaḥyā ibn Sa'īd → .) and,

(14) Mālik ibn Anas (d. 179 A.H.).

Imām Mālik is the last exponent of this school.

<u>IRAQI SCHOOL :</u> This school was divided into the seats of (i) Basra and (ii) Kufa; the famous jurists of the Basra centre were;

(1) Muslim ibn Yasar (d. 108 A.H.) ;

(2) Al-Hasan ibn Yasar (d. 110 A.H.), and

(3) Muhammad ibn Sirin (d. 110 A.H.)

Amongst the Kufan jurists the following are well known;-

(4) Alqamah ibn Qays (d. 62 A.H.) ;

(5) Masruq ibn al-Ajda (d. 63 A.H.);

(6) Al-Aswad ibn Yazid (d. 75 A.H.);

(7) Shurayh ibn al-Harith (d. 78 A.H.);

(8) Ibrahim al-Nakh'i (d. 96 A.H.);

(9) Al-Sha'bi (d. ca, 103 A.H.);

(10) Hammad ibn Abi Sulayman al-Ash'ari (d. 120 A.H.), and

(11) Abu Hanifah, (d. 150 A.D.)

Nu'man ibn Thabit known as Abu Hanifah is the last and famous jurist among the Iraqi ones in this period.

<u>SYRIAN SCHOOL :</u> The following famous jurist belong to this School;-

(1) Qabisah ibn Dhuwayb, d);

(2) Umar ibn 'Abd al-Aziz (d. 101 A.H.);

(3) Makhul (d. 113 A.H.), and

(4) Al-Awza'i (d. 157 A.H.)

Among the Syrian jurist al-Awza'i is the last.

It should be noted here that these succeding jurists (Tabi'i Fuqaha') derived their legal knowledge

from the Companions (Sahabah) living in their respective areas. The jurists of Medinah for instance derived their legal knowledge mostly from the reports and verdicts (Fatawa) of Hadrat 'Umar (d.), 'Aishah (d. 58 A.H.) and Ibn 'Umar (d.) while the jurists of Kufa had it from the judgments and opinions of Hadrat 'Ali (d.) and Ibn Mas'ud. (d.).

Another fact to be noted is that the desciples of these succeeding jurists (Tabi'i Fuqaha') associated themselves with their own masters. Muhammad Al-Shaybani, Abu Yusuf, and others for instance, refer to Imam Abu Hanifah as the authority of all their writings Ibn al-Qasim, Ziyad al-Lakhmi, Yahya al-Laythi and other pupils of Malik refer to Imam Malik as their authority. And so did the desciples of al-Awza'i and later on the students of al-Shafi'i and Ahmad Ibn Hanbal. Thus there appeared the four schools of law viz, Hanafi, Maliki, Shafi'i, and Hanbali.

III - JURISPRUDENCE IN MUSLIM SPAIN

THE

THE EARLY PHASE:

Muslim forces in the Command of Tāriq ibn Ziyād landed on the soil of Spanish peninsula on 28th of Ramaḍān 92 A.H./30th April, 711 A.D. The invasion of Mūsa ibn Nuṣayr almost completed the conquest of Spain in 93 A.H./712 A.D.(42) After the conquest the army as well as the civilian officials with thousands of their subordinate staff settled in the land. Many Arab tribes also migrated to Spain and settled there. This was the period of young-Ṣaḥābah (the Companions) and al-Tābi'ūn (the successors). These virtuous scholars and their disciples laid the foundation of intellectual activities in Spain. A brief account of the early Spanish scholars is given here.

THE COMPANIONS OF ṢAḤĀBAH: This was the period of those Ṣaḥābah' who were youngest in the time of the Prophet. It is presumed that some Ṣaḥābah (Companions of the Prophet) might have visited this land (Spain). We find only one name of a Ṣaḥābi, al-Munaydhir who visited Spain. A mention about al-Munaydhir's life and visit to Spain is also found in the works of biographers like Ibn 'Abd al-Barr, Ibn Bashkuwāl, Ahmad

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(42) Al-Maqqarī, Nafḥ al-Ṭīb, Cairo, 1302 A.H., Vol. I p. 107; Pascual, De Gayangos, the history of the of the Muhammadan Dynasties in Spain, NewYork, 1969, Vol. II, Appenix, LXXXI.

Ibn Rushd and al-Maqqari. "The Sahabi (al-Munaydhir) says al-Maqqari, " first settled in Africa; at the time of the conquest he entered Spain in the suite of Musa".(43) This Sahabi narrated the ahadith of the Holy Prophet to his Spanish students amongst whom 'Abd al-Rahman, better known as al-Jubayli is very famous.(44) The early Spainsh jurists and theologians were greatly benefited by this Companions of the Holy prophet.

THE SUCCESSORS OR AL-TABI'IN : Musa ibn Nusayr, the conquaror of Spain was himself a successor (tabi'i). Some learned tabi'i landed on this peninsula along with him and some came afterwards and settled there. About their number the historians have different views. In Habib is of opinion that three tabi'i's entered into Spain.(45) Ibn Bashkuwal in his work entitled, al-Tanbih wa al-Ta'yin liman dakhala al-Andalus min al-Tabi'in mentions as many as eighteen tabi'in. Other writers enumarate the number as twenty. The highest number according to al-Maqqari is ten.(46)

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(43) Al-Maqqari, Nafh al-Tib, Vol. I P. 131;
ذكر الحجارى انه (المنيذر من الصحابة و انه دخل الاندلس
مع موسى بن نصير غازيا

(44) Ibid.

(45) Ibid, Vol, I P. 130.

(46) Ibid.

A brief account of some of the Spanish tābiʻīn is given below:-

(i) Ḥanash al-Ṣanʻānī, a student of Ḥaḍrat ʻAlī, entered Spain with Mūsā ibn Nuṣayr. Originally he was a native of Ṣanʻā a village in Syria. Al-Maqqarī, on the authority of Ibn al-Faraḍī, says that Ḥanash settled in Saragossa where he laid the foundation of the great mosque. of the town. The inhatitants of Saragossa as he says, were very much proud of his being tābiʻī among them. He died in 98 A.H. and worked as a governor of Saragossa for some time.(47)

(ii) Abū ʻAbd Allāh ʻAlī ibn Rabāḥ al-Lakhmī was another tābiʻī, who was born in 15 A.H. (733 A.D.), the year of Yarmūk. He was ordered to join the army of Africa after he incurred displeasure of the Umayyad Caliph. He remained there till the invasion of Spain and Mūsā took him into his suite. He thus entered to Spain and settled there;(48)

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(47) Ibid, Vol I p. 130 ; Vol, II , P. 52;

انه كان مع على بن ابى طالب رضى الله عنه .... و غزا لاندلس
مع موسى بن نصير .... ان صنعا و المنسوب اليها قرية من قرى
الشام .... ان حنشا كان بسر قسطه و انه الذى اسس جامعها
و بها مات و قبره بها معروف عند باب اليهود بغربى المدينه....

(48) Ibid, Vol, I, Pp. 130-1.

(iii) Ḥayāt Ibn Rajā al-Tamīmī, the narrator of aḥādīth, also entered Spain (49);

(iv) Ḥayyān Ibn Abū al-Ḥublā, a mawlā of Banū 'Abd al-Dār, is the narrator of aḥādīth reporting from 'Āmir Ibn al-'Āaṣ, Ibn Abbās and Ibn 'Umar. He entered Spain with Mūsā and settled here. He was one of those jurists whom caliph Umar Ibn 'Abd al-'Azīz sent to Africa for teaching islamic law and theology to the people. He also held a post in the Government of Egypt. (50)

(v) Al-Mughīrah ibn Abī Bardah also entered Spain in the suite of Mūsā. He was a student of the famous Companion Abū Hurarayh and narrated aḥādīth from him. The aḥādīth reported by him are also found in Mālik's al-Muwaṭṭa. (51)

(vi) 'Abd al-Raḥmān ibn Mughīth (secretary of 'Abd al-Raḥmān al-Dākhil) also came to Spain with Ṭāriq and played an important part in the conquest of Spain. (52)

(vii) Ḥayāt ibn Rajā',

(viii) 'Iyād ibn 'Utabah al-Fihrī,

(ix) 'Abd 'Allāh ibn Samāsah,

(x) Manṣūr ibn Khuzāmah, (53)

and other such learned tābi'ī came to Spain and settled there. They spread the knowledge of the qur'ānic injunctions (aḥkām) and the Sunnah of the Prophet in this peninsula and helped the people grow in learning and become at a

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(49) Ibid.

(50) Ibid,
و كان فى ديوان مصر فبعث به عمر بن عبد العزيز الى افريقية فى
جماعة من الفقهاء ليفقهوا اهلها و كان روى عن عمر بن العاص و ابن عمر
وغزا مع موسى حين افتتح الاندلس.

(51) Ibid, Vol, II, P. 53.

(52) Ibid, Vol, II, P. 55

(53) Ibid, Vol, II, PP. 53-55.

later stage " learned jurists of Spain."

INTRODUCTION OF MĀLIKĪ LAW IN SPAIN:

The intellectual activities of the early Spanish scholars, as a matter of fact had their roots in Syrian theological and legal schools, as most of the officials as well as the intellectuals who settled in Spain, had had their educational training in Damascus the capital of Syria. In general Spanish students who followed their teachers strictly, visited Damascus, Aleppo (Halab), Emessa (Ḥimṣ) and other Syrian seats of learning to complete their education. Al-Maqqarī observes:

اعلم ان اصل الاندلس كانوا في القديم على مذهب الاوزاعي و اهل الشام منذ اول الفتح ....

"Remember that the Andalusians followed the school of al-Awzāī and that of the Syrian jurists in the former times, right from the conquest."(54)

It is, however, doubtful that al-Awzā'ī was exclusively followed by the Syrians settered in Spain. For Imam Mālik wielded a greater influence on the jurists of Andalus than Imām al-Awzā'ī. This is further established on the basis of the following evidence:

(1) Abū 'Amr 'Abd al-Raḥmān Ibn Muḥammad al-Awzā'ī, the great jurist and the founder of the Syrian school of Law, was born in 88 A.H./706 A.D., (and according to some biographers in 93 A.H./711-2 A.D.),

(54) Ibid, Vol, II, P. 158.

He, according to ibn Khallikān, died on Sunday the 29th Safar 157 A.H./21st December 774, A.D.(55) His teaching period (if it is accepted that he started teaching his students as an 'Imām or 'the great jurist' at the age of thirty) must be about forty years. It is thus established that his juristic career lasted from forty years./ i.e. 117-157 A.H.

(ii) Imām Mālik is the contemporary of al-Awzā'ī. He was born in Madīnah in 93 A.H./712 A.D. and died in Rabī' al-Awwal, 179 A.H./795 A.D.(56) If, like al-Awzā'ī, his career as is presumed, started from the age of thirty as an 'Imām' or 'the great jurist. Malik must have started his own legal system in 123 A.H. which lasted during his life time until 179 A.H.

(iii) A biographical survey of the Spanish jurists shows that the jurists who studied with al-Awzā'ī, also went to al-Madīnah and acquired knowledge from Mālik. This is confirmed in the case of Ghāzī ibn al-Qays and a number of other jurists.

(iv) The Spanish jurists who met Imam Mālik were about nineteen(their brief accounts are given afterwards). Most of them were contemporary of al-Awzā'ī ; two or three died even before Imām Mālik. They, after their return to their land (Spain), narrated al-Muwaṭṭā of Imām Mālik to their students.

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(55) Ibn Khallikān, Wafayāt al-'Ayān, Cairo, 1367/1948, Vol, II, P. 310.

(56) Ibid, Vil, III , P. 248.

On the question as to who first narrated al-Muwatta in spain, Qadi 'Iyad among the early authorities, has mantioned two names (i) Ghazi Ibn al-Qay (d. 177 A.H.) and (ii) Ziyad al-Lakhami (d. 173 A.H.).(57) Dr. Husain Munis on the authority of Ibn al-Qutiyah has established the same view.(58)

(v) Right from the conquest of Spain (in 93 A.H./ 711 A.D.) upto the death of Awza'i (157 A.H.), the people of Spain followed the Syrian jurists. At the time which Imam Malik died (179 A.H.), Hisham I (R. 172 A.H./ 788 A.D. to 180 A.H'/796 A.D.) was the ruler of Spain. He was a great admirer of the Imam and was under the influence of Ziyad al-Lakhmi, a great jurist and a disciple of Malik.

Al-Maqqari's statement "earlier the Andalusians followed the Syrian (Jurists)", is therefore a fact beyond doubt, but it is very difficult to accept his view that "they (Andalusians) ~~thousent~~ followed the school of al-Awza'i ." Al-Awza'i's legal school hardly lasted for fifty years if the time is reckoned from the death of al-Awza'i until the establishment of Maliki school as state Law.

SPANISH DISCEPLES OF MALIK :

To establishe the fact that some Spanish jurists met Imam Malik, studied with him, and narrated his al-Muwatta to their Spanish students (as mentioned supra para4 4) it is necessary to recall their activities

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(57) Qadi Iyad, ~~Tartib al-Madarik wa taqrib al-ma'rifa~~ a'lam madhhab al-Malik, Rabat, 1965, Vol.III,pp.114

(58) Husain Munis, al ~~Fikr al-Andalusi~~, p. 418

in brief. Qadi 'Iyad's work, Tartib al-Madarik wa taqrib al-Masalik li ma'rifat a'lam madhhab al-Malik, provides a comprehensive list in this respects. 'Iyad (d. 544 A.H.) has divided these jurists into following three tabaqat :

(i) Those who were of the age of Malik, had their own place in scholarship, met him to narrate from him and died either before him or soon after his death. These are called al-tabaqat al-'Ula or the first group.

(ii) Those who had been his student for a long period, had the opportunity of living with him as his pupil, and narrated from him. They are mentioned under al-tabqat. al-wusta the midle group.

(iii) Those who joind the Imam in his last days or were very young at the time of his death. These decipls of Malik are placed under al-tabqat al-Sughra or the lowest group.

AL-TABAQAT AL-ULA OR THE FIRST GROUP: This group consists of the following jurists ;

(i) Ziyad b. 'Abd al-Rahman al-Lakhmi known as Ibn Shabtun : He belonged to Cordova. Hearing about Malik he visited al-Madinah and narrated al-Muwatta from him. Qadi 'Iyad on the authority of al-Shirazi says that during his stay in al-Madinah, the Medinian scholars called him "the jurist of Spain".(59) An interesting story has been narrated by 'Iyad from Abu Bakr al-Maliki. Once Ziyad entered the chamber of Malik where Ibn Kinanah, another jurist, was present. The latter did not know Ziyad. So he asked Ziyad about his country, Ziyad

(59) Qadi 'Iyad, Tartib al-Madarik, Rabat, 1965, Vol. III, p. 117.

gave him the answer. Ibn Kinanah then said, "Who is the leading jurist of your country"? "I myself and others like me," replied Ziyad.(60) Ibn Kinanah then started questioning him on some of (the most difficult legal problems). Within a few moments he realised the scholarship of Ziyad, and kept silent. The ruler of Spain, Hisham I (d. 180 A.H./796 A.D.), was very much influenced by his scholarship, admired his virtues and piety. He offered him the post of judge (Qadi), but Ziyad refused to accept the post.(61)

Ziyad died in 173 A.H. before the death of Malik (179 A.H.) in Cordova. He advised his favourite student Yahya to see Imam Malik in al-Madinah.(62)

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(60) *Ibid*, the words of this story read as follows;

حكى ابوبكر المالكى ان زيادا قدم المدينه فدخل على مالك

وعنده ابن كنانه فلم يعرفه ابن كنانه ـ فسأله ابن كنانه

عن بلده فذكره ـ فقال من فقيه بلدكم ؟ قال ـ انا ،أو نحو ذلك

(61) *Ibid*, Vol. *III*, p. 118; Ibn al-Fur'di, *Tarikh al-Ulama' wa Ruwat bi 'ilm al-Andalus*, Cairo 1373/1954, Vol. *I*, p. 183; Al-Maqqari, *Nafh al-Tib*, Cairo, 1302 A.H., Vol. *I*, p. 344.

(62) *Ibid*, Vol. III, pp. 116-122;

(ii) Al-Ghazi Ibn al-Qays was an Umayyid scholar from Cordova. He went to the east and was benifitted by the great authorities like al-Awza'i, Ibn Jurayj, through ibn Zayd and Muhammad ibn Wardan. He then went to al-Madinah, narrated al-Muwatta from Imam Malik and learnt the Qur'anic recitation (Qira'at) from Nafi ibn Abu Na'im, a Qari of al-Madinah. After his return to Spain, he was offered the post of Qadi (Judge) but he refused it. His two sons, 'Abd Allah and Muhammad, and other scholars like Ibn Habib, Asbagh ibn Khalid, 'Uthman b. Ayub are his students. He died two years before Malik in 177 A.H. (63)

(iii) Sa'id ibn 'Abdus (d. 180 A.H.) is another jurist who met Imam Malik and narrated al-Muwatta from him. He belonged to Toledo and was the jurist-consult (Mufti) of the city. After his return to his city he was appointed as Qadi of the school of Malik. (64)

(iv) Sa'id ibn Abu Hind, Abu 'Uthman also belonged to Toledo. He visited al-Madinah and met Imam Malik. Qadi 'Iyad on the authority of Ahmad ibn 'Abd al-Barr and Ibn Harith says that Imam Malik gave him the title of "Hakim al-Andalus". When he returned to the country he was appointed as minister. (65) 'Iyad, reffering

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(63) Ibid, Vol, III, pp. 114, 16; Ibn al-Faradi, Tarikh al-Ulama wa al-Ruwat li 'ilm bi al-Andalus, Vol, I, p. 387.

(64) Ibid, Vol, III, p. 113,

(65) Ibid, Vol, III, p. 123, the statement of Ibn al-Harith reads;

عبد الرحمن بن أبى هند الاصبحى من اهل طليطله — يكن
اباهند مالكا وكان له مكرما وكان يسميه حكيم الاندلس وانصرف وسكن
[illegible]

to Kitab al-Qudat, by Ibn Harith says that he was also appointed as the judge (Qadi) of Toledo.(66)

It is, however, understood from these two statements that soon after Sa'id's return he was appointed as Qadi (Judge) and then after some years he was made Wazir (Minister).

About the date of his death 'Iyad has received two versions Abu Sa'id al-Sadafi states that he died in 200 A.H while Ahmad says that he died in the days of 'Abd al-Rahman (d. 172 A.H./788 A.D.) before the death of Imam Malik.(67)

(v) Yahya Ibn Mudar al-Qaysi was among the jurists of Cordova, He was a student of Sufyan al-Thawri. He visted al-Madinah and narrated from Imam Malik 'Iyad has not mentioned the date of his death. From his biography it is evidently understood that he was alive in 187 A.H.(68)

AL-TABAQAT AL-WUSTA OR THE MIDDLE GROUP : In the second category (al-Tabaqah al-Wusta) of the Spanish diciples of Imam Malik, Qadi 'Iyad has mentioned the following nine names;

(i) Qarmus Ibn Abbas (d. 200 A.H.) was a jurist of Cordova who first received his education from the learned jurists Ibn al-Thawri, Ibn al-Jurayj, al-Layth and Ibn Hazim then went to al-Madinah and narrated

(66) (Ibid, Vol, III, pp 124,.
(67) Ibid, Vol, III, pp. 123,125,
(68) Ibid, Vol, III, pp. 126-7.

hadith from Malik, Qadi Abu al-Walid al-Fardi, considers him in the first group (69) (al-Tabaqah al-Ula).

(ii) The most famous among this group is Muhammad b. Sa'id b. Bashir. Originally he belonged to Bajah and was educated in Cordova. After his return from al-Madinah he was appointed the chief judge of Cordova by the Ruler al-Hakam I (180 A.H./796 A.D. to 206 A.H./822 A.D.) Ibn al-Qutiyah says that Muhammad b. Sa'id was the best and learned jurist and was very strict in his judgments. (70)

(iii) Talut ibn 'Abd al-Jabbar al-Muafari was another disciple of Malik who also belonged to Cordova. (71)

(iv) 'Abd al-Rahman ibn Musa al-Hawari another jurist of this group belonged to a village of Marur city, then settled in Istenja and was educated from al-Asma'I Ibn 'Ayniyah and Abu Zayd. After his return from al-Madinah he was appointed as judge of his own city. (72)

(v) 'Abd al-Rahman ibn 'Abd Allah was another chosen pupil of Malik who narrated al-Muwatta from him. (73)

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(69) Ibid, Vol, III, p. 325.

(70) Ibid, Vol, III, pp. 327-39

(71) Ibid, Vol, III, p. 340.

(72) Ibid, Vol, III, p. 343.

(73) Ibid, Vol, III, p. 344.

(vi & vii) Ḥasan and Ḥafṣ, the two sons of 'Abd al-Salam al-Salamī were also the students of Imām Mālik. They went together to learn from the Imām and lived with him about seven years. They belonged to Saragossa.(74)

(viii) Shabṭūn ibn 'Abd Allāh al-Anṣārī (d.212 A.H. the Qāḍī of Toledo was also the student of Imām Mālik.(75)

(ix) Another juirst Muhammad ibn Yaḥyā known as Fatis ibn 'Umm Ghāziyah is also mentioned among the disciples of Mālik. He belonged to Cordova. 'Iyāḍ on the authority of Ibn Ḥārith says that the famous judge Ibn Bashīr, (a jurist of this group) consulted him in his judgements.(76) About his death 'Iyāḍ has given two narrations. In the first, he says that he died after 206 A.H. while in the second, on the authority of Yaḥyā b. Yayḥā, he says that he died about 208 A.H.(77)

(x) Dāwud ibn Ja'far, another jurist of this group, was educated by, Ibn 'Ayniyan and Mu'awīyah b. Ṣāliḥ. He went to al-Madinah and narrated from Imām Mālik. He was appointed as Qāḍī of Qalanbariya. Muṭrraf b. Qays says tht about three thousand ahādith have been narrated from him.(78)

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(74) Ibid.

(75) Ibid.

(76) Ibid, Vol, III, pp. 345-6. كان ابن البشير القاضى يشاورنى فى احكامه ، محمد بن سعيد السبائى

(77) Ibid, Vol, III, PP. 345-6.

(78)

(78) Ibid, Vol, III, p. 346.

<u>AL-TABAQAT AL-SUGHRA OR THE YOUNG GROUP:</u> In this group Qadi 'Iyad has enlisted only one name, the famous jurist Yahya al-Laythi. Originally he belonged to a Barbar tribe educated in Cordova and narrated Muwatta of Imam Malik from his teacher Ziyad al-Lakhmi known as Shabtun who directly narrated it from the Imam. On the advice of his teacher Ziyad, he left Andalus to see Imam Malik at al-Medinah. Al-Maqqari says that Yahya left Spain at the age of twenty-eight and arrived at al-Madinah a few months before the death of Malik and lived with the Imam till he breathed last. Qadi 'Ayad, al-Maqqari and other historians have narrated a very interesting incident during his stay with Malik. They say that once Imam Malik was delivering lecture to his students. Suddenly there was ac cry that an elephant was passing. Everybody attending the lecture left the class-room to see the elephant except Yahya, the Imam said, "Why did you not go outside to see the elephant? It is not found in your country". Yahya replied, 'I have come from my country to see you and to learn from you and not to see an elephant'. Malik was very much impressed to hear the answer and said, "This is the wise-man of Spain".(79) So Yahya narrated <u>al-Muwatta</u>' from Imam Malik. After his death Yahya visited Mecca and studied with the Meccan jurists like Sufyan and others. He also went to Egypt and narrated

(79) <u>Ibid</u>, Vol, <u>III</u>, pp.379-94; Al-Maqqari, <u>Nafh al-Tib</u>, Cairo, 1302 A.H. Al-Maqqari narrates the story in these words:

هو (يحيى) عنده في مجلسه مع جماعة من اصحابه اذا
قال قائل حضر الفيل فخرج اصحاب مالك كلهم و لم يخرج
يحيى فقال له مالك لم تخرج و ليس الفيل في بلادك ؟
فقال انما جئت من الاندلس لانظر اليك و اتعلم من هديك

from Layth ibn sa'id and 'Abd Allah Ibn Wahab. On his return to his native land he was appointed Chief Qadi of Cordova. After rendering great service to the Malikite school of law this great jurist died in Rajab 234 A.H.(80)

SPANISH RULERS ADMIRE THE MALIKI SCHOOL:

Imam Malik lived in a period when the Ummayid dynasty was founded in Spain. Its founder 'Abd al-Rahman al-Dakhil (rule, 138 to 172 A.H.) and his son Hisham I (rule, 172 to 180 A.H.) were the contemporaries of Imam Malik. The illustrious Imam always asked his Spanish disciples about the morals of the Rulers of this regim Knowing that the rulers of this Muslim dynasty lived in a simple way and observed the shari'ah Laws strictly, he prayed for them.

Pascual has mentioned a quotation from al-Nabdh al-Mukhtasar min Kitab mirat al-Zaman fi tawarikh al-A'yan which reads as follows:

"Malikh once asked an Andalusian doctor", what are 'Abdul Rahman's habits and mode of living ." The doctor answered him, 'Abdul Rahman wears woolen cloth", eats rye-bread and fights for the cause of God". The Doctor began to enumerate other good qualities upon which Malik was so much pleased that he exclaimed إن زين حرمنا به "May the Almighty God ornament our Harem with him ....(81)

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(80) Ibid.

(81) Pascual, the History of the Muhammadan Dynastus in Spain , New York, 1964, Vol, I,P. 403. Pascual, has rightly disagreed with the author's View that the Legal school of Imam Malik was made as the state Law of Spain during the reign of 'Abd al-Rahman.

For Hishām, the son of 'Abd al-Raḥmān (rul... 180 A.H.), the same words were said by Imām Mālik to Ziyād al-Lakhamī, Ibn Shabtun (d. 173 A.H.), a prominent Spanish jurist. Al-Maqqarī narrates them in these words:

"Hishām followed the model of the Caliph 'Umar ibn 'Abd al-'Azīy. He appointed his trusted men in different provinces and their task was to investigate the conduct of the administrators directly from the citizens and to submit confidential reports to Hishām. If any of his officers was convicted for committing injustice or any sort of corruption, he would deprive him from his post and the officer was treated as disqualified for public service for ever. When Ziyād ibn 'Abd al-Raḥmān (a famous Spanish jurist) reported such habits of Hishām to Imām Mālik, he said, "May the Almighty preserve his life and make him one of our selects".(82)

These remarks of the illustrious Imām were naturally reported to 'Abd al-Raḥmān and his son Hishām and they were naturally inclined towards the legal school of Mālik. And thus some Malikite jurists were appointed on judicial posts during the reign of these rulers. For instance, Sa'īd ibn 'Abdūs (d. 180 A.H.)(83), Ibn Abū al-Hind (d. 200 A.H.)(84) and Shabtūn ibn 'Abd Allāh (d. 212 A.H.)(85) etc, were appointed as Judges in the

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(82) Al-Maqqarī, Nafh al-Tib, Vol, I, P. 158

وكان هشام يذهب بسيرته مذهب عمر بن عبد العزيز وكان يبعث بقوم من ثقاته الى الكور فيسألون الناس عن سير عماله و يخبرونه بحقائقها فاذا انتهى اليه حيف من احدهم اوقع به و اسقطه و انصف منه ولم يستعمله بعد و لما وصفه زياد بن عبد الرحمن لمالك بن انس قال نسال الله تعالى ان يزين موسمنا بمثل هذا .

(83) Qāḍī 'Iyāḍ, Tartib al-Madarik, Rabat, 1965, Vol, III, P.11?

(84) Ibid, Vol, III, P. 123

(85) Ibid, Vol, III, P. 344

province of Toledo. 'Abd al-Rahman al-Hawari was appointed the Judge of 'Astanjah,(86) and Dawud ibn Ja'far as the judge of Qalanburiyah.(87)

The great Spanish Malikite jurist Ziyad al-Lakhmi better known as Ibn Shabtun, was offered the post of Chief Justice by the ruler Hisham but he refused. But when Ziyad was forced to hold this office, he left Cordova. After realising the fact that this virtuous and pious jurist would not like to hold any position in the Government, Hisham desired that Ziyad may advise the Ruler in legal matters. Qadi 'Iyad (d. 544 A.H.) in the biography of Ziyad al-Lakhmi says;

"Ziyad was pious ~~jurist~~ and devoted to prayer. Hisham offered him the Judicial office. He refused and left Cordova, on which Hisham said, "All peoples are not like Ziyad or else nobody would have been interested in the world. Hisham prefered Ziyad to others ~~"Had the pupils been like Ziyad, the desires of the people of this world would have been fulfilled ...... Hisham was very much impressed by Ziyad~~ and respected him and sought his guidance and advice on theological and legal questions and followed him."(88)

PROCLAMATION OF MALIKI SCHOOL AS STATE LAW:

The legal school of Imam Malik was proclaimed as the state-law of Spain during the reign of al-Hakam, the third Ruler of Ummayid dynasty. Al-Maqqari in this connection remarks;

ففى دولة الحكم بن هشام بن عبد الرحمن الداخل و هو ثالث الولاة بالاندلس من الامويين انتقلت الفتوى الى راى مالك بن انس و اهل المدينه .... وذلك براى الحكم و اختياره —

((86) Ibid, Vol, III, P. 343.
(87) Ibid, Vol, III, P. 350
(88) Ibid, Vol, III, P. 119.

كان زياد ناسكا و راوده الامير هشام على القضاء فابى عليه و خرج هاربا بنفسه — فقال هشام ليت الناس كلهم مثل زياد حتى اكفى اهل الرغبة فى الدنيا ... و كان الامير هشام يوثر زياد و يكرمه .... و يسائله عما يعرض له من امور دينه فياخذ برائه و يبالغ فى بره —

"During the reign of al-Hakam ibn Hisham ibn 'Abd al-Rahman al-Dakhil (rule 180 A.H./796 A.D. to 206 A.H./822 A.H.), the third Ruler of the Ummayid dynasty, the legal judgement was converted according to the opinions of Malik and the Medinite Jurists .... And this change was brought by the orders and the authority of al-Hakam".(89)

After Maliki School was declared as the state-law during the time of al-Hakam, Yahya al-Laythi (d. 234 A.H.), the most favourite student of Ziyad al-Lakhmi and a direct disciple of Imam Malik, was appointed as Chief Judge of the state. He , played a great part in popularising the Maliki School of Law.

Ibn Hazm has criticized the enforcement of Maliki School in Spain and has discussed Yahya's efforts in these words:-

"There are two Legal Schools, which from the very beginning spread through power and pelf the Hanafi School and the Maliki School. Abu Yusuf was appointed as Chief Judge (Qadi al-qudat) of the Muslim state which extended from the most remote provinces in the East to the frontiers of Eastern Africa. He favoured the Hanafite Judges to perform the duties of a judge in different parts of the state. Exactly the same policy was adopted by Laythi in Spain. For, when the eminent Jurist gained the favour of Sultan (al-Hakam), his legal opinion were accepted and no Qadi was ever appointed without his consent. Having

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(89) Al-Maqqari , Nafh al-Tib, Vol, II, P. 158

sole authority in a very short time the administration of Justice was completely in the hands of the friends and disciples of Yahyā or some other eminent scholars of Mālikī School."(90)

The charge of Ibn Hazm is proved absurd for the following reasons;

(1) It has been already stated that the disciples of Imām Mālik started narrating his al-Muwaṭṭā in Spain during the very life of Imām Mālik. Thus upto the death of Yaḥyā al-Laythī in 234 A.H. for nearly one hundred years the Maliki school was constantly taught in Spain with the result that the school became deeply rooted among the Muslim masses of the country.

(2) Even before Yaḥyā there were numerous Malikite Jurists who held ~~the~~ judicial posts. Yahya cannot, therefore, be charged of favouring his disciples or friends unduly.

(3) Ḥakam's father Hishām, the second Ruler of the Umayyid Dynasty, was already impressed by Mālikī Law. He requested, rather forced Ziyād al-Lakhamī to accept the post of Chief Judge of Cordova. But on his refusal he made him his adviser on Judicial matters. 'Abd al-Raḥmān I also respected the illustrious Imām. It, therefore, can be said that the rulers were already under the influence of Mālikī

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(90) Ibid, Vol. I. p. 326.

مذهبان انتشرا فى بدء امرهما بالرياسة و السلطان - مذهب ابى حنيفة فانه لما ولى القضا ابو يوسف كانت القضاء من قبله من اقصى المشرق الى اقصى عمل افريقية فكان لا يولى الا اصحابه و المنتسبين لمذهبه و مذهب مالك عندنا بالاندلس فان يحيى بن يحيى كان مكينا عند السلطان مقبول القول فى القضاة و كان لايلى قاض فى اقطار الاندلس الا بمشورته و اختياره و لا يشير الا باصحابه و من كان على مذهبه...

Jurists due to the distinctive and honourable personality of Imam Malik.

(4) In the Abbaside period the political as well as intellectual activities shifted from Damascus to Baghdad. Spanish people being Arabs in origin, were naturally inclined towards the Hijazi jurists. They were more traditionalists (ashab al-Hadith) than the Iraqi jurists who were alleged by their opponents as reationalists (ashab al-Rayi). Thus it was quite natural for the people of Andalus to follow the School of Malik.

(5) As the Umayyid rule ended in Syria and their dynasty was re-established in Spain naturally their connection with the jurists of Syria grew weak. Moreover, Spanish jurists performed Hajj ceremony and made frequent contacts with the Meccan and Medinite jurists. This became a usual feature every year. Thus right from the teaching career of Imam Malik (93 to 179 A.H.) upto the death of Yahya al-Laythi (d. 234 A.D.), Chief Judge of Cordova, hundreds of jurists were benefited by the Hijazi or the Malikite School.

IV - JUDICIARY OF SPAIN

KHITTAH AL-QADA :

"The Judicial department or Khittah al-Qada," says al-Maqqari, "was the most important one to the common people as well as to the dignitary of Spain."(91)

وأما خطة القضاء بالاندلس فهي أعظم الخطط عند العامة و الخاصة .

Dr. Husain Munis describes this office (Khitata al-Qada') as next to the Spanish ruler in dignity, reputeand powers.(92)

Al-Mawardi (d. 450 A.H.) has described the following main functions of this department:-

(1) Settlement of disputes.

(2) Restoration of fundamental rights.

(3) Excution of prescribed punishments.

(4) Exeution of will.

(5) Administration of endowments.

(6) Removal of public encroachments.

(7) Control over the Auqaf Treasury.

(8) Control over the sub-ordinate courts, their staff and watbhing their conduct and activities.(93)

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(91) Al-Maqqari, Nafh al-Tib, Cairo, 1302 A.H. Vol. I p. 101.

(92) Husain Munis, Fajr al-Andalus, Cairo, 1959, p. 639.

(93) Al-Mawardi, Ahkam al-Sultaniyyah, Cairo, 1298 A.H., pp. 67-8.

The Muslim rulers though appear to be despots in their territories were, as the history bears witness very submissive to the injunctions of the Sharī'ah and strictly followed and implemented the judgements of their own appointed Qāḍī's — a precedent which is hardly available in the history of other nations of the world. The prevailing system of Judiciary and courts of judges of the most modernised countries of today, does not seem to be free from some sort of exploitation and bias, and hardly accessible to the commonality who are unable to pay the required fees. On the contrary courts of the Muslim Judges were always open to any man demanding justice and fair dealings without paying any fee or fear of undergoing any hardship.

Judiciary in Spain was always independent, and so we find numerous examples of it in the judicial history of Spain.

(1) Qāḍī Muḥammad Ibn Rawb convicted a favourite officer of al-Manṣūr, the Ruler. The officer (Muḥammad) appealed in the court of caliph al-Manṣūr against the conviction. But the caliph giving his judgement said;

يا محمد انه قاضى و هو فى عدله و لو آخذنى بالحق ما اطلقت
الامتناع عنه عد الى محبسك و اعترف بالحق فهو الذى يطلقك ......

"O, Muḥammad he is a judge and if he be right in his judgement it is not in our power to resist his authority or oppose his sentence. Your are now to return to your jail and confess the truth which will set you free".(94)

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(94) Al-Maqqari, Nafh al-Ṭib, Vol, I , p. 192.

(2) Qadi Ibn Bashir (d. 823 A.D.), the Chief Judge did not hesitate to pass judgement against the Amir and made him pay compenstion to a suitor.(95)

(3) On another occasion Qadi Ibn Bashir refused to accept the testimony signed by the Ruler who had to appear in the court to give his evidence before the Chief Justice.(96)

(4) The judge of Almeriah gave the stay orders in case of construction of the palace of the Ruler al-Mu'tasim b. Samadih till the payment of the encroached land of an orphan was made.(97)

H E A D O F T H E J U D I C I A R Y :

In the Muslim camps of Spain Judicial head was to begin with called, Qadi al-Jund, Judge of the Troops. But when the Muslims established their dynasty in Spain, the head of the judiciary was Known as Qadi al-Jama'ah, the Judge of the Muslim Community. This title, says, Dr. Munis was used by 'Abd Al-Rahman al-Dakhil and the first Qadi al-Jama'ah was Yahya b. Yazid.(98) Later on he was called Qadi al-Qudat, Chief ~~of the~~ Judge or Wazir al-Qada, Minister of the judiciary.(99)

(95) Imamuddin, S.M, A Political History of Muslim Spain, Dacca, 1969, p.338.

(96) Ibid.

(97) Imamuddin, S.M, The Economic History of Spain, Dacca, 1382/1963, p. 400.

(98) Husain Munis, Fajr al-Andalus, Cairo, 1959, p. 645.

(99) Al-Maqqari, Nafh al-Tib, Vol, I, p. 101.

As stated by Dr. Husain Munis the Chief Justice in Cordova was an important personality in the fields of learning and politics. The history of Spain cannot be compeleted or correct without the history of its judges.(100)

Qāḍī al-Jama'ah or Chief Justice was appointed by the Khalīfah himself. His rank was that of a minister. Being the chief of judiciary he was the appointing and controlling authority of all judicial courts. As the Supreme judge, he was the highest legal authority and used to hear the appeals and the cases of serious nature. For legal verdicts a panel of jurists known as "Majlis al-Shūrā", advisory council or "Aṣḥāb al-Rāyi," used to assist him. The panel of consultants, according to Ibn Ḥayyān held their seats just next to the Chief Justice in official ceremonies.(101)

Besides his powers in civil, criminal and administrative matters, he enjoyed some powers in matters relating to revenues. The treasury, Bayt al-Mal of Spain, was of two types;

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(100) Husain Munis, Fajr al-Andalus, p. 640;

وكان القاضى الجماعة فى القرطبه شخصية لها اهميتها فى مجالات
العلم و السياسة فى الاندلس بحيث لا يمكن التاريخ الاندلسى تاريخا
صحيحا الا اذا ألم الانسان بتاريخ قضاته ....

(101) Ibn Ḥayyān, Al-Muqtabas fī Akhbār bilad al-Andalus, Bairut, 1965, p. 206.

(i) Khazinat al-Māl or Bayt al-Māl, the treasury of general public, wealth of the Muslims and non-Muslims. The head of this treasury was called Khazin al-Māl or Ṣaḥib al-Makhzūn,

(ii) Bayt al-Māl lil-Muslimīn, the treasury of the Muslims, for dealing with waqf and orphan properties, its head being the Chief Justice. The main treasury of Bayt al-Māl lil-Muslimīn was kept at Cordova mosque and its key were in the possession of the chief Qāḍī. No one was empowered to draw any amount from this treasury except by the order of the court of the Chief Judge. Even if the Caliph needed some amount due to shortage of funds in the general treasury (Bayt al-Māl), he had to make a request to the Chief Judge. It was purely upto his discretion to sanctions an amount for the purpose requested for.(102)

The office of the Chief Qāḍī was generally located near the Cordova mosque. In official ceremonies and selected gatherings he was considered amongst the a'yān al-Khāṣṣah and held his seat with the Ministers. Ibn Hayyān describes a certain ceremony as follows:

قعد الامير ابو الوليد هشام لاكابر الخلفاء من اهل الدوله بقصر قرطبه .... و توصل اليه نبيه الوزراء فقعد وابين يديه ....
و تلاهم من اعيان الخاصة قاضى الجماعة محمد بن اسحاق بن سليم

(102) Imamuddin, S.M, The Economic History of Spain, Dacca 1963, p. cf. Levi Provencal and E.B. Gom's, Tratada de Ibn Abdūn.

The Ruler Abū al-Walīd Hishām, one of the great caliphs of the dynasty, sat in Cordova palace.... the Ministers came and took their seats in front of him .... and they were followed by the Chief Justice Muhammad ibn Ishaq, among the chosen dignitaries.(103)

In another place he states the arrangement of the officials in the Caliph's court saying,

ثم الوزراء على مراتبهم ثم القاضى الجماعه محمد بن اسحاق

"Wazirs according to their ranks, then Chief Justice Muhammad Ibn Ishaq".(104)

Judiciary of Spain was divided into four courts:-

(i) Qaḍā' al-ʿAdālah, Court of Justice.

(ii) Qaḍā' al-Iḥtisāb, Judicio-Administrative Court.

(iii) Qaḍā' al-ʿAskar, Military Court.

(iv) Qaḍā' al-Maẓālim, Tribunal Count.

QAḌĀ' AL-ʿADĀLAH :

Judicial courts of Spain were organized on the basis of administrative units. Since Cordova was the capital of Dynasty, the judicial chief, Qāḍī al-Qaḍā also held his offices at Cordova. The following were his sub-ordinate courts.

(1) Qāḍī al-Kūrah ; The state was divided into small provinces called Kūrah. The head of the civil administration of a Kūrah was called Wālī. The head of judiciary of one Kūrah was called "Qāḍī al-Kūrah",

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(103) Ibn Hayyan, al-Muqtabas, p. 153.

(104) Ibid, p. 206.

who was directly responsible to the Chief Justice or Qāḍī al-Jamā'ah of Cordova. We find the names of some Qāḍī's of different Kuras in al-Muqtabas, their tours and presence in the official ceremonies. At one place the statement of transfer reads as follow:

و فى يوم السبت أعيد أصبغ بن قاسم بن قاسم بن أصبغ الى
الى ما كان بيده من قضاء قربونه و نقل أحمد بن محمد بـــن
مفرج عن قضاء شذونه و أشونه و تاكرنا الى القضاء بكورة ريه
مكان خالد بن هشام .

"On Saturday Aṣbagh b. Qāsim b. Qāsim b. Asbagh was sent back to his former posts and Aḥmad b. Muḥammad b. Murfaj was transferred from the judgeship of Shīdhūnah , Ashūnah and Tākirnā to the judgeship of Kurah Rayyah on the place of Khālid b. Hishām." (105)

(2) Qāḍī al-Balad : Civil administrator of a big city and its surrounding areas was called Ḥākim or Ṣāḥib al-Balad while its judicial head was known as Qāḍī al-Balad. Dr. Munis calls this administrarive units as aqlīm (106) and says;

ان الاندليسين يعنون بالاقاليم الكبيره او البلده وحوزها المتصـــــل

Ibn Hayyan has also mentioned some names of the Qāḍīs of such areas. (107)

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(105) Ibid.

(106) Husain Munis, Fajr al-Andalus, p. 579.

(107) Ibn Hayyan, al-Muqtabas, p. 75.

(3) 'Ādil : Magistrates of small villages or one or two mohallas of a big city were known as 'Ādil. In the beginning they acted as notaries, and the witness of good repute. Later on they were chosen as 'assessors' to assist the judges. In case a judge ever vacated his office, sometimes it so happened that the assessor appointed by the Qāḍī won the favour of the head and continued in the court as judge.(108)

On the occasion of official ceremonies they were also invited and had their seats with the judges and jurists. Ibn Ḥayyan has mentioned their presence in a number of ceremonies.(109)

(4) Ṣāḥib al-Mawārith : To decide the disputes of inheritance, wills, guardianship of minor heirs and maintenance of orphans' properties, seprate courts were set up whose judge was called, Ṣāḥib al-Mawārith, resembling the modern Court of Wards. These courts were mainly located in big cities. The caces and properties in the small towns were looked after by Qāḍī al-Balad' of the area.(110)

(5) Qāḍī al-Dhimmiyin; Non-muslims or Dhimmis were subject to their personal laws. Thus in each city a Qāḍī was appointed from its own people, who was empowered to decide the cases of marriage, divorce, inherritance, non-muslim waqf, etc. of his area.

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(108) Amir Hasan Siddiqui, The Origin and development Muslim Institutions, Karachi, 1962, p. 112.
(109) Ibn Hayyan, al-Muqtabas, p.
(110) Ibid, Imamuddin, S.M, Political History of Spain, Dacca, 1969, p. 338.

But the cases relating to general (State) laws of t.. non-Muslims and the disputes between Muslims and non-Mus. were dealt with by the judicial (Muslim) courts of the Dynasty.(111)

To provide the legal assistance for the judges, the Institution of <u>iftā'</u> was also established. In the absence of any codification of Islamic Law the Qāḍīs were vested wide powers of interpretation. But in complicated and doubtful cases the Qāḍīs referred the matter to a, jurist-consult. These fuqahā' and muftīs, according to Ibn Ḥayyān, commanded honourable position and were invited with the judges on important occassions.(112)

<u>QĀḌĀ' AL- IḤTISĀB :</u>

Responsible officials of the civil administration also had some judicial powers. This office can be compared with that of the modern Ombudsman. In the beginning these officials were also under the Qāḍī but later on they were separated from judicial duties because of heavy duties in their respective departments. Although while taking a decision on any offence relating to their department, they were acting as 'judicial Qāḍī their judgements, in case of dispute, were referred to the judicial authority (Qāḍī) of that area. Thus the matters came under one judicial sub-ordination i.e. the Chief Justice or Qāḍī al-Jamā'ah.

Some of the important courts of Qāḍā al-Iḥtisab or Judicio-Administrative Courts were as follows:

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(111) <u>Ibid</u>.
(112) Ibid, p.

(1) Sahib al-Madinah : Administrator of City
Sahib al-Madinah, in the beginning was also called, Sahib al-Layl, the nigh-guard and Sahib al-Shurtah, the Police Chief. And he was always a Qadi, holding the charge of judiciary, civil administration and Police. But later on (in 10th century) these departments were separated and the position of Sahib al-Madinah became as Hakim or deputy wali of a Kurah (Province). His judical powers were similar to those of the city magistrate but in case of legal dispute the final verdict lay with Qadi al-Balad'. He dealth in generally with the cases relating to the Government servents, bribery, revenue, assualts labour, criminal breach of trust, cheating, mischief, criminal treaspass, sales, forgery, breach of contract etc. etc.

(2) Muhtasib : A separate department to control the affairs of commerce and industry was established; its head was known as Muhtasib and wali al-Ahkam al-hisbah. He decided the cases and awarded the punishment of flogging and fine. The nature of his cases was fraudulent use of false weights, adulteration of food, drink and drugs, making of false coins, etc. etc.

(3) Sahib al-Ahdath : Shurtah or ahadth was the Police Department and dealt mostly with a law and order situation and cases of criminal nature. The head of the

city Police was Sahib al-Shurtah, having the ra of a Qadi. The provincial police chief was known as Sahib al-Ahda'th. The heads of police performing their duties as Qadi, were dealing with the cases like those of theft, murder , robbery, dacoity, wine drinking rape, kidnapping conspiracy, etc. etc.(114)

Q A D A ' A L - ' A S K A R :

To maintain discipline and to decide the cases of army personnel , a judicial system was set up in the troops. In every unit of the army therew was a Qadi or military judge. These military courts were under the Qadi al-'Asakir, the Judge of the troops,(115) who was responsibl to the Central Chief Justice.

Q A D A ' A L - M A Z A L I M :

Judicial powers, as we have seen, were divided among the civil and judicial officers. Departmental checks were introduced in the Civil as well as Judicial departments for the eradication of corruption and malpratices. But in case a department or on influential official made use of a legal issue for personal gain, two types of Operational Courts were set up in every kurah . viz :

(1) Sahib al-Mazalim", for hearing the complaints and claims against the officials of the civil administration; and;

(2) "Sahib al-Radd " for hearing the complaints against the judgments of the judicial Qadis.

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(114) Ibid.

(115) Ibid.

Later on these courts were merged under one heading called, "Qada al-Mazalim", the Operational or Tribunal Courts. In every Kurah one courts of Sahib al-Mazalim was established which worked under the direct control of a wazir in the centre called wazir Sahib al-Mazalim, the Minister of Operational Judges.(116) Complaints and cases against the small officials were heard by Sahib al-Mazalim in Kurah while complaints against the higher officials were heard by wazir Sahib al-Mazalim himself.

Ibn Hayyan has mentioned a case against the dismissal of a Governor (Wali) of Sevolli saying:-

و فی یوم الاثنین صدر شوال منھا خرج المكلون بابن الخال
سعيد المعزول عن ولايه كورة اشبيلية نحو الوزير صاحب المظالم عبد
الرحمن بن موسى بن حدير المرسل لاشبيليه لجنة ما تشكاه اهلهـــا
من حيفه عليهم ليقفه مع المتظلمين منهم و يتحق عليه ما نسبـــوه
اليه من مظالمهم نيتصف منهم و ممن استعدوا عليه من حاشيته و خدمته

"On Monday the Ist Shawwal Maklun Ibn Khal Sa'id who had been dismissed from the Governorship of Seville Province went to meet Minister for Mazalim, 'Abd Al-Rahman b. Musa b. Hudar, who had come to Seville for investigation of the complaints of its inhabitants against an injustice done to them and enquring into the allegations against the Governor and his officers. So he (Minister for Mazalim dispensed justice as regards the complaints aginst him (Governor) and his officials and subordinates.(117)

(116) Imamuddin, S.M, A. Political History of Muslim Spain, Dacca, 1969, p. 338.

(117) Ibn Hayyan, al-Muqtabas, p. 86.

V - AL-BAJI AS CHIEF JUDGE

PARTICIPATION IN JUDICIARY:

The early biographers of al-Baji merely describe him as a Qadi and do not provide further details. Ibn Khallikan (d. 681 A.H.) and Ibn Farhun (d. 799 A.H.) are of the opinion that during his stay in the east, (118) al-Baji was appointed as a judge (Qadi) of Halab (Syria).

In Spain when his fame reached far and wide and his juristic repute spread the rulers of different petty states made use of Al-Baji's legal and juristic sagacity. Ibn Farhun says:

.... و شهرت تاليفه نعرف حقه و عظم جاهه و قرب من الرؤسـاء"
و استعملوه فى الامانات و القضـاء" .

" . . . His writings became well known, his position in the society was well established and he became nearer to the rulers and chiefs. They utilized him in deciding the trust and judicial cases." (119)

But Ibn Farhun does not mentione as to who first utilized the abilities of al-Baji and how was he selected

~~[illegible]~~ (120)

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(118) Ibn Khallikan, Wafayat al-A'yan, Cairo 1367/1948, Vol, II, p. 142; Ibn Farhun Dibaj al-Mudhahab, Cairo, 1351 A.H.p. 120 .

(119) Ibid.

ثم استدعاه المقتدر بالله نصار اليه مرتاحا و بدا بانقه ملتا حاو هناك ظهرت تواليفه الى سلطانه و ايثاره لحضرته باستيطانه و يحتفل فيما يرتبه له و يحبريره و ينزله فى مكانة متى كان يوامنه .

Pl. insert in note 120 P. 112

for judiciary. Al-Maqqarī supports him by saying:

"Then al-Muqtadir bi Allāh invited him. h with him at ease and in his horizon his virtues shone forth, his books and methods became prominent, his swiftness on the ways of guidance was manifested. Al-Muqtadir was proud of having him in his court, preferring him to others and was giving him full facilities. At the time of his arrival in the court, al-Muqtadir paid him great respect and gave him a distinguished place." (120)

The above statement explains the nature of his post in judiciary, the time and place of his appointment.

Since the ruler of the state of Saragossa Aḥmad b. Sulaymān, Sayf al-Dawlah, al-Muqtādir billah (Rule 438/1046 to 474/1081) invited him to his kingdom and issued him the appointment letter from his own office, his appointment was naturally for the post of Qāḍī al-Quḍāt, Chief Justice of Saragossa.

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(120) Al-Maqqarī, Nafh al-Ṭīb, Cairo, 1302 A.H., Vol. I, p. 357;

→ - - -
(Arabic)

As al-Muqtadir invited him after Al-Bājī won name and fame for his knowledge of jurisprudence, he must have gone to Saragossa after having his debates with Ibn Ḥazm in Mallorca and after his stay for some years in Denia, Valencia and Murcia. His exact date of appointment, however cannot bev determined. He was probably appointed after 450 A.H.

J U R I S D I C T I O N   O F   T H E   P O S T :

As the head of judiciary, he was responsible to look after the affairs of the judiciary of the Kingdom of Saragossa which in those days was divided into seven administrative provinces called iqlīm (a city and its surrounded areas). These iqlīm were as follows:-

(1) Iqlīm al-Madīnah (i.e. Saragossa); the jurisdiction of this Iqlīm was from the gate of Saragossa to Melilah;

(2) Iqlīm 'Abbād Palace : It was from the iqlīm of the city upto the boundaries of Tortose;

(3) Iqlīm Qutandah : This iqlīm was situated about sixty miles from the city of Saragossa;

(4) Iqlīm Zaydūn : This iqlīm was surrounded by Tortosa, Vellencia, Tedmir and Beria ;

(5) Iqlīm Baltush or Pleitos : This iqlīm started from a village Muela upto Saragossa city, spread over 20 miles ;

(6) Iqlīm Qantush : It also spread over 20 miles from the the Nueva city to Abreh river;

(7) Iqlīm Shalun : This iqlīm was located on the western side of the Saragossa city near a village Cabañas upto

(121)
Ricla.

In every iqlīm there was a separate judge, having the status of Qādī al-Balad under the direct controll of al-Bājī, while every Qādī al-Balad had his subordinate courts according to an established judicial strucutre of Spain.

<u>RETIREMENT FROM JUDICIARY :</u>

His exact date of retirement is not mentioned by the biographers Qādī 'Iyād says that Qādī Ibn Shibrīn, a student of Al-Bājī joined him at Saragossa in the same year (i.e. 469 A.H.) and also travelled with him to Meria and remained with him till (Al-Bājī died in 474 A.H. (122) It, therefore appears that al-Bājī left Saragossa after 469 A.H.

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(121) Husain Munis, <u>Fajr al-Andalus,</u> Cairo, 1959, pp. 484-5.

(122) Qādī 'Iyād , <u>Azhār al-Riyād</u>, Cairo, 1359/1940, Vol; <u>III</u>, p. 156;

انه (ابن شبرين) رحل الى ابى الوليد الباجى سنة
تسع و ستين و اربع مئة و صحبه بسر قسطه ثم سافر
معه الى المريه حتى مات ابو الوليد فكانت صحبته له
نحو اربعة اعدام .

C - THE MANUSCRIPT

DESCRIPTION OF THE MANUSCRIPT

'Abd al-Walid al-Baji's al-Isharah fi usul al-Fiqh or, as mentioned by al-Ashbili in his al-Fihrist, "al-Isharah 'ila ma'rifat al-usul wa al-wajarah fi ma'na dalil (1) has survived in two manuscripts; One preserved at Escorial, Spain, and the other in al-Maktabah al-Azhariyyah, Cairo.

(i) ESCORIAL MANUSCRIPT : The Escorial manuscript is included in a volume having four other works under the Call.No. " MS. Arab No. 1107 Escorial". The volume consists of 167 folios in all. The collection opens with the work Kitab al-Khilaf by al-Baghawi, a book on jurisprudence containing 68 folios. The second work is Ibrahim al-Shirazi's Kitab al-Luma', on principles of Muslim jurisprudence and runs up to folio No. 117.

Al-Isharah fi usul al-Fiqh , is the third work in this collection and starts from folio 118 and ends with folio 133 having 16 folios in all. The remaining two works are Batlayusi's "Kitab al-Ism wa'l Musamma", and Kitab al-Tanbih 'ala al-Ma'na wa al-asbab allati awjabat al-Khilaf bayn al-muslimin fi ara'ihim wa madhabihim". كتاب التنبيه على المعاني والاسباب التي اوجبه الخلاف بين المسلمين في آرائهم و مـــذ هبهم

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(1) Al-Ashbili, al-Fihrist, Bairut, 1382/1963 p.255-6.

The whole collection is transcribed by one Kātib (scribe) in "maghribī" script. The text of the book al-Ishārah is clear and legible. The script is however difficult to read; and it needs some labour to acquaint one-self with the Maghribī script. On collation with the Cairo Ms, it is revealed that the Cairo manuscript is complete in all respects but lacks one sections entitled صيغة اللبس لبعض الحضر, ~~only~~. The scribe does not mention his own name any-where in the collection nor does he give the date of transcription. We find only one remark on the last folio of the fourth book viz. al-Ism wa'l Mussamma" which reads as follows;-

طالعه عبد الرحمن بن على بن احمد شير لاحسانـه

"Abd al-Raḥmān studied this manscript ...."

This note indicates that 'Abd al-Raḥmān ibn "Alī al-Bust̤āmī of the city of Barūsah (d. 858 A.H./1454 A.D.), author of Tarājim al-'Ulamā', a work on the Hanafite jurists and historians, read this collection which must have transcribed before his death in 858 A.H./1454 A.D.

The microflim of this manuscript is now preserved in the library of Islami Research Institute, Islamabad, (Microflim No. 333). It was brought from Escorial Museum, Madrid, by Dr. M.S.H. Maṣūmī in 1964. An enlarged photostate copy of the same is also available in the Institute (photostate No. 130).

(ii) CAIRO MANUSCRIPT : In his Fihrist al-Makhṭūṭāt al-Muṣṣawarah, Sayyid Fuwād has described another manuscript of al-Ishārah. This copy is preserved in al-Azhar under "Uṣūl al-Fiqh (170) 5786." (Al-Maktabah al-

Azhariyah). The cataloguer has written a note on the last page of the manuscript which indicates the date of its preservation in photostat shape and reads as follows:-

تمت تصويرا لقسم الجغرافيه بكلية الاداب بجامعة الفواد الاول - فى يوم ثلثاء
١١ يوم رمضان عام ١٣٦٦هـ الموافق ٢٩ من يوليا ه سنة ١٩٤٧ م -

"The photostat copy was completed at the Department of Geography in Kulliyat al ʿĀdāb at the University of Fuwād I Cairo on Tuseday 11th of Ramaḍān 1366 A.H./29th of July, 1947 A.D."

The manuscript contains 17 folios (from 17 to 45) of the size 14 x 18 s.m., written in 'maghrabī script which is difficult to read. This is an incomplete copy and abounds in lacunae. About five sections (Fuṣūl) are missing at the beginning of the book and about eitht others in the middle. On the top of the last folio, some one has written;

٤٥ ورقة - مسطرته مختلفة

(45 leaves with different lines). This agrees with the details given by the cataloguer of al-Azhariyah on its proforma.

The scribe mentions his own name and the date of transcription in the colophon preserved at the end of the book:

كملت الاشارة لابى الوليد الباجى فى اصول الفقه بحمد الله وحسن
عونه - وذلك فى يوم السابع من رمضان المعظم عام اثنين وتسعين و سبعماية
على يد الفقير الى الله تعالى الحسن بن مسعود الحاجى المكناوى غفرالله له ولوالديه
والمسلمين امين والصلواة والتسليم على سيدنا محمدواله وصحبه وسلم تسليما
كثيرا الى يوم الدين ورضى الله تعالى عن الصحابة اجمعين -

كملت الإشارة لأبي الوليد الباجي
في أصول الفقه بحمد الله وحسن عونه
وذلك في يوم السابع من رمضان المعظم
ورضي الله تعالى عن الصحابة أجمعين

The last folio of the Cairo, MS, of "Al-Isharah fi usul al-Fiqh". The last paragraph is the colophone of the work.

"The book al-Isharah by Abu al-Walid al-Baji on the principles of jurisprudence completed with thanks to Allah and with the best of his assistence. And this on 7th day of Ramadan 792 A.H. (28th July, 1892 A.D.) at the hand of Al-Hasan Ibn Mas'ud al-Haji al-Mutakawi ...."

The manuscript is available in Pakistan both as a microflim and a photostat copy in the Library of Islamic Research Institute, Islamabad, obtained obviously from Cairo in 1970 and preserved under Microflim No.340 and photostat No. 185. The work was published on the margin of Qurrat al-Ayn from Tunisia in 1351 AH and found defective in transcription.

THE AUTHENNTICITY OF THE MANUSCRIPTS:

The book of al-Baji is narrated by his son Ahmad Abu al-Qasim, a pious jurist of Spain. He also narrated all other books of al-Baji directly.

Ibn Farhun provides more information and says:

و أخذ عنه اجلة من اصحاب ابيه كابى على الصدفى — وحدث عنه الجيانى — و اذن له ابوه فى اصلاح كتبه فى الاصول فتبعها و ألف كتابه معيار النظر و كتاب سر النظر و كتاب البرهان .

"His father's great students like al-Sadafi studied from him. Al-Jiyani (a prominant jurist) and Muhaddith) also narrated from him. His father permitted him to edit his books on principles of Jurisprudence. On the same style he wrote his book (i) Mi'yar al-Nazar, (ii) Kitab Sirr al-Nazar and (iii) Kitab al-Burhan ....(8)

(2) Ibn Farhun, Dibaj al-Mudhdhahab, Cairo, 1351 A.H. P.40.

By transmisson through different narrators, the book reached the hands of Khalīfah al-Ashbīlī (502/118-575/1179), who mentioned it in his al-Fahrist. He maintains the classicial technique of the narration and provides the sources as to how and from where this book was narrated down to him.

THE TEXT OF THE MANUSCRIPT :

The text of al-Ishārah begins with the following sentence;

ادلة الشرع على ثلثة اضرب ــ أصل و معقول اصـ ل واستصحاب حال .

"The sources of the Sharī'ah Law are of three kinds (i) the Root (ii) the Intelligible meaning of the Root and (iii) the Association with the prevailing conditions".

The classification as a matter of fact is logical and rational. By al-Aṣl or the Root, he means the fundamental and basic sources which according to him are (i) al-Qur'ān (ii) al-Sunnah and (iii) Ijmā al-'Ummah.

By Ma'qūl al-aṣl , the author means all those legal method which are derived from the Root .

Al-Ḥāl or the association with the prevailing conditions are very important in the opinion of the author and thus he preciesly discusses this source of the Sharī'ah Law in the book.

The first part contains mainly the words of expression : the imperative and the prohibition , the exemptions, the common usage, the prophetic sunnah,

the abrogator and the abrogated and various sections regarding the consensus of the community .

The Second part deals with the rules regarding analogy, juristic equity and other discources relating to reasoning etc.

The third part is devoted to discussions on the use of intellect in Sharī'ah statutes, rule regarding the burden of proof, descriptions of a mujtahid, prefrence of chain of narrators text and meaning etc.

IMPERFECTIONS OF THE CONSTRUCTION :

A cursory glance of the manuscript leads a person to notice the following blemishes:-

(a) The author, as stated earlier, has divided the book in three parts. At the end of each part he should have given some sign to indicate the end of the part. But he uses the words تم الجزء الاول (first part completed) after the discussion on al-Sunnah instead of puting these words at the end of the first part-after the discourse on al-Ijmā'. Moreover in the begining of the third part he uses the words باب استصحاب الحال (Chapter on the decision of Association with the prevailing conditions) which seems to be a wrong arrangment. The author does not use (باب) in the two preceding parts; hence it is not a chapter but a part. of the preceeding chapter.

(b) Some discussions are left out without a any title of Bāb or *Faṣl* like the discussions on (i) Masā'il al-Nihy (ii) Ḥukm al-Muṭlaq wa al-Muqayyad (iii) Dhikr al-Nāsikh wa al-Mansūkh (iv) Aḥkām al-Qiyās (v) Tarjīḥāt al-Mutūn, etc. (3)

(c) Similarly, the words 'Bāb' and 'Faṣl' at some places are wrongly inserted. For instance one title of a chapter (Bāb) reads ابواب العموم و اقسامه Under which the author had discussed 'Fuṣūl' of the particulars and general words and rules regarding them. (4) Its exact title may however فصول العموم والخصوص و احكامه instead of ابواب العموم و اقسامه

THE CONTEMPORARY MANUSCRIPTS:

The technical defects in the MS. of al-Ishārah mentioned above cannot apparently be traced to the author. The juristic literature, specially on principles of Jurisprudence, was generally of the same style during that period. This can be proved if we study some contemporary works like : (i) Al-Asrār fi'l-Uṣūl wa al-Furū and (ii) Al-Asrār wa teqaddum li'l-addillah by a Hanafite Jurist al-Dabūsī (d. 432 A.H.) (iii) Al-Fiqīh wa al-Mutaffaqqih by Khaṭīb al-Baghdādī (d. 463 A.H.). (iv) Al-Khilāf and (v) Al-'Ādah by Muḥammad ibn Ḥusayn al-Farrā' (d. 458 A.H.) (vi) Al-Luma' fī uṣūl al-Fiqh and (vii) Al-Tabṣirah fī uṣūl al-Shafiiyyah by a

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(3) C/M, folios, 3-b; 6-a; 9-a; 12-a; 15-b.

(4) Ibid, folio No, 4-a.

Shafiite Jurist Ibrahim ibn 'Ali al-Shirazi al-Feruzabadi (d. 476 A.H.). (viii) Al-Burhan fi usul al-Fiqh, (ix) Al-waraqat fi usul al-Fiqh, and (x) Kitab al-Mujtahidin, by al-Ma'ali 'Abd al-Malik ibn 'Abd Allah al-Juwayni (d. 478 A.H.). (xi) Usul al-Sarkhasi, by a prominant, Hanafite Jurist Muhammad ibn Ahmad al-Sarkhasi (d.483 A.H.)

These and similar contemporary works were compiled either in detailed (mutawwal) form or precise (mukhtasar) form. 'Al-Isharah fi usul al-Fiqh' by al-Baji (d. 474 A.H.) is in fact clearer more systematic, logical and exhaustive than the mukhtasar works on the subject of that period.

The author, as we have stated earlier, has classified and introduced the principles of Jurisprudence in a few words. His method of presentation is quite rational. He first introduces a discourse, defines a term or mentions a rule. Secondly, he gives his own opinion and the existing opinions or differences of the jurists thereon. Thirdly, he provides the evidences from Qur'an, Sunnah, Ijma' and Qiyas, as the case may be, supporting his view or the rule under discussion.

The concise, rational and logical approach and systematic method of presentation are the main characteristics which distinguish al-Isharah fi usul al-Fiqh from other contemporary works on the principles of Muslim Jurisprudence.

II

T R A N S L A T I O N

(i) Aṣl — the Root.

(ii) Ma'qūl al-Aṣl — Intelligible meaning of the Root.

(iii) Istiṣḥāb al-Ḥāl — Association with the prevailing Conditions.

Maktabah al-Azhariyah

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NAME OF THE AUTHOR:

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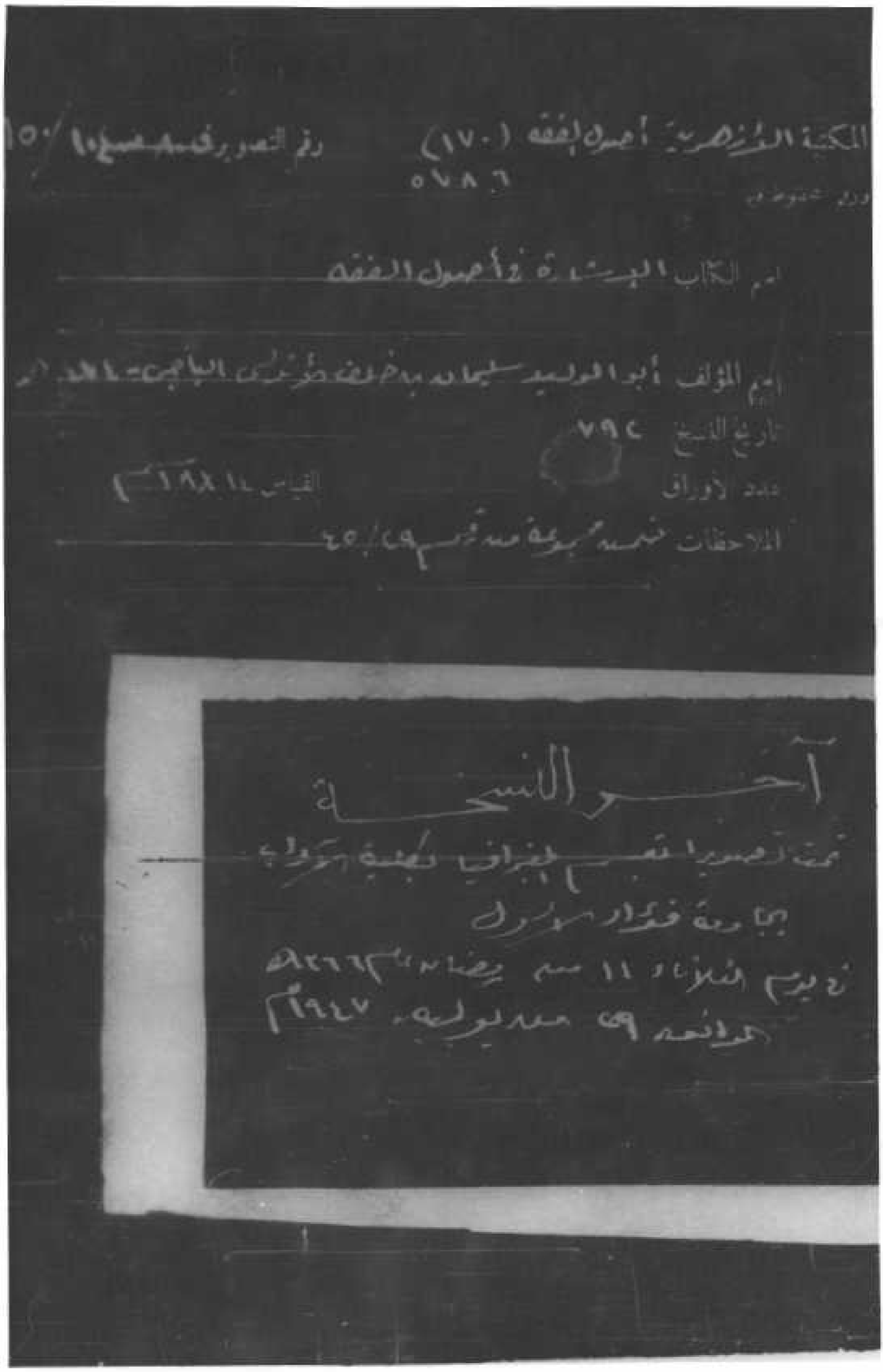
المكتبة الأزهرية أصول الفقه (١٧٠)

٥٧٨٦

اسم الكتاب الإشارة في أصول الفقه

اسم المؤلف أبو الوليد سليمان بن خلف الباجي

تاريخ النسخ ٧٩٢

عدد الأوراق

الملاحظات

آخر النسخة

تمت تصويرا بقسم الجغرافيا بكلية الآداب

بجامعة فؤاد الأول

في يوم الثلاثاء ١١ من رمضان سنة ١٣٦٦هـ

الموافق ٢٩ من يوليه سنة ١٩٤٧م

Librarian's note on Cairo MS, of "Al-Ishārah fī uṣūl al-Fiqh".

بســـــم الله الرحمن الرحيـــــم
صلى الله على محمد وعلى اله و سلم تسليما بعونك اللهم يا معين

M/2-A M/2-A In the name of Allāh, the Merciful, The Compassionate. Allah may have blessings and peace upon Muḥammad and his family, with Thy assistance, O! Allāh !

The Sources of the Sharī'ah are of three kinds:-

(1) Aṣl, the Root,

(2) Ma'qūl Aṣl, the intelligible meaning of the Root.

(3) Istiṣḥāb Ḥāl, Association with the prevailing conditions.

As for the-Aṣl, Root, it consists of :-

(i) Al-Kitāb (the Holy Qur'ān), (ii) al-Sunnah (the Prophetic Behaviour) and (iii) Ijmā' al-'Ummah (The Consensus of the 'Ummah).

The Ma'qūl al-Aṣl,(The Intelligible meaning of the Root) is, however, Laḥn al-Khiṭāb (the tone of expression).

As for Istiṣḥāb Ḥāl, (Association with the prevailing conditions), it stands for Istiṣḥāb Ḥāl al-'Aql, (Association with the accompanying conditions based on the intellect).

A. AL-KITĀB OR THE BOOK

CHAPTER - I

KINDS OF EXPRESSIONS

SECTION. I : THE SECONDARY MEANING (AL-MAJĀZ).

Having ascertained the sources of Sharī'ah, the Book (of Allāh) contains two kinds (of expressions):—

(1) MAJĀZ OR SECONDARY MEANING ; and,

(2) ḤAQĪQAH OR REAL MEANING.

Majāz or the Secondary Meaning is " a word which is used for other than its own meaning", and is of four kinds;-

(1) SUPERFLUOUS (Ziyādah), as in the expression of Allāh the Exalted one, فبما نقضهم "And because of their breaking their covenant;"(1) (ما being superfluous).

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(1) Al-Qur'ān, 5: 12.

(ii) OMISSION (Nuqṣān), as says the Exalted One, وسئل القرية "Ask the (people of) township,"(2) (اهل being omitted).

(iii) CHANGE OF ORDER (Taqdīm wa Takhīr), like the expression of Allāh, الذى اخرج المرعى فجعله غثاء احوى "who createth, then disposeth, who measureth them."(3) (the expression is, اخرج المرعى احوى فجعله غثاء).

(iv) METAPHOR OR (Isti'ārah), like the expressions of Allāh; (a) قل بئسما يامركم به ايمانكم "Say (unto them); Evil is that which your belief enjoineth on you,"(4) (b) واخفض لهما جناح الذل من الرحمة "And lower unto them the wing of submission through mercy,"(5) and (c) ان الصلوة تنهى عن الفحشاء والمنكر "Lo ! worship preserveth from lewdness and inequity."(6) (Imān, Janāḥ al-Dhull and al-Ṣalāt have been metaphorically expressed as agents).

Some (Jurists) argue that al-Majāz is used under dire necessity, while Allāh, the Exalted, is above it.

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(2) Ibid, 12 : 82.

(3) Ibid, 87 : 4-5.

(4) Ibid, 2 : 93.

(5) Ibid, 17 : 24.

(6) Ibid, 29 : 45.

we do not agree (to this) because the eloquent on the contrary use Majaz, instead of the real expression (Haqiqah), ~~although the latter~~ and consider former is more idimatic and rhetorical than the ~~former~~ latter.

They further argue that the whole Qur'an is true (Haqq); it is, therefore, impossible that anything which is true is not real. The answer is that this (statement also) is not correct. Surely a true object may not be real for some reason. This is why either of the two (the real and what is not real) can be combined with the opposite of the other; and hence, it is true to say, "a lion is in the house", when there is a brave man in the house"; and it is false to say, "Zayd is in the house", when there is nobody inside the house.

Muhammad Ibn Khuwayz Mandad,(7) one of our authorities and Dawud al-Asbahani(8) hold that it is not

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(7) Muhammad ibn Ahmad ibn 'Abd Allah, Khuwayz Mandad was an Iraqi jurist, studied with al-Abhari, wrote some books on jurisprudence like, K. Kabir fi al-Khilaf, K. fi usul al-Fiqh and K. fi Ahkam al-Qur'an etc. (Ibn Farhun, Dibaj al-Mudhahhab, Cairo, 1329 A.H., p. 269).

(8) Muhammad ibn Dawud ibn 'Ali ibn Khalf al-Asbihani (255/869-297/910,) was a famous Zahirit jurist of Baghdad, He wrote some books on Jurisprudence. (Ibn Khallikan, Wafayat al-'Ay'an, Cairo, 1948, Vol, III, p. 390).

right to say that the Qur'ān contains 'Majaz' (secondary meaning of an expression) as we have already made clear.

SECTION 2 : REAL MEANING (AL-ḤAQĪQAH).

As for the "Real Meaning" (Ḥaqīqah) it is "a word which is used for its (designed) meaning."

Ḥaqīqah is of two types;

(i) DETAILED (Muffaṣṣal).

(ii) CONCISE (Mujmal).

The Muffaṣṣal is that word "which conveys its full meaning by its expression only and does not need further explanation".

This again is of two kinds;-

(i) IMPROBABLE (Ghayr Muḥtamal) and

(ii) PROBABLE (Muḥtamal).

As for Ghayr Muḥtamal, it is," the text alone which is raised to the highest point of explicitness". Such as the expression of Allāh, والمطلقات يتربصن بأنفسهن ثلاثة قروء "women who are divorced shall wait, keeping themselves apart, three (monthly) courses."(9) This is a Naṣṣ (clear text) and the word three (ثلاثة) bears no other probable meaning.

Thus, when such a clear text occurs it must referred to and acted upon unless there is something abrogating or contradicting.

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(9) Al-Qur'ān, 2 : 228

ناسخ أو متعارض. فصل: وأما المجمل فهو ما احتمل معنيين
متنافيين وهو على ضربين: أحدهما ألا يكون في أحد محتملاته أظهر منه في
سائرها نحو قولك لون الذي يقع على البياض والسواد وغيرهما من
الألوان ونحو ذلك واحد الذي هو في أحد محتملاته أظهر منه في سائرها.
فإذا قال من يلزمه أمره اصبغ هذا الثوب لونا فإن كان ثم دليل على معنى
التخيير فأي لون صبغته كنت ممتثلا لأمره، وإن أراد بذلك لونا بعينه لم
يمكنك امتثال الأمر إلا بعد أن يبين اللون الذي أراده، ولا يجوز أن يتأخر البيان
عن وقت الحاجة إلى امتثال الفعل. والثاني أن يكون اللفظ في أحد محتملاته
أظهر منه في سائرها كألفاظ الظاهر والعموم. فصل: فأما الظاهر
فهو المعنى الذي يسبق إلى فهم سامعه من المعاني التي يحتملها اللفظ ك
كالفاظ الأمر نحو قوله تعالى أقيموا الصلاة وآتوا الزكاة واقتلوا المشركين
فمثل هذا اللفظ إذا ورد وجب حمله على الأمر وإن كان يجوز أن يراد به الإباحة
نحو قوله تعالى وإذا حللتم فاصطادوا، والتعجيز نحو قوله كونوا حجارة أو حديدا
والتهديد نحو قوله تعالى اعملوا ما شئتم إنه بما تعملون بصير، والتعجب نحو قوله
أحسن بزيد وقل مثل ذلك في قوله تعالى أسمع بهم وأبصر يوم يأتوننا إلا أنه
أظهر منه في الأمر منه في سائر محتملاته. فيجب أن يحمل على الأمر إلا أن
ترد قرينة تدل على أن المراد به غير الأمر فيصار عن ظاهره إلى ما دل عليه
الدليل. فصل: إذا ثبت ذلك فالأمر اقتضاء الفعل بالقول
على وجه الاستعلاء والقهر والقصد، وهو على ضربين واجب
ومندوب إليه. فالواجب ما كان في تركه عقاب من حيث هو ترك له
على وجه ما نحو قوله تعالى أقيموا الصلاة وآتوا الزكاة. والمندوب
إليه هو المأمور به الذي في فعله ثواب وليس في تركه عقاب من حيث هو
ترك له على وجه ما نحو قوله تعالى فكاتبوهم إن علمتم فيهم خيرا وآتوهم
من مال الله الذي آتاكم إلا أن لفظ الأمر في الوجوب أظهر منه في الندب

"Al-Isharah fi usul al-Fiqh", by Qadi Abu al-Walid al-Baji, Escorial MS, No. 1107, fol. 2b.

SECTION 3 : THE PROBABLE WORD (MUHTAMAL)

The Muhtamal is that word "which bears two or more meanings".

Muhtamal is of two forms;-

(1) EITHER, it is less explicit in one of it probable meanings than the rest. For instance, your expression "colour" is equally applicable to white, black and other colours, and is not explicit for one particular colour; it applies to the rest of colours. Now when somebody, whose command is binding upon you says, "Dye this cloth", and if the order implies choice (on your part) and you dye in any colour, you would be obeying his order. But if he intends a particular colour, you cannot execute the order unless he explains the colour he wants; and the explanation cannot be delayed till the time of executing the order.

(2) OR, the word is more explicit in one of its probable meanings than the rest, like Zahir (explicit) and 'Aamm (general) words.

SECTION 4 : EXPLICIT WORD (ZAHIR).

The Zahir is, " a meaning which strikes to the hearer immediately and ~~is the same which~~ one of those meanings for which the word has been coined (and which it ~~to~~ convey on its utterence)". For instance the imperative words, as Allah says,(1) اقيموا الصلوة واتوا الزكوة
"Establish worship and pay Zakat," (10) اقتلوا المشركين

(10) Ibid, 2 : 43.

"Slay the Idolaters."[11] So whenever this (kind of) word occurs, it will be treated as a commandment ('amr). Sometimes however it may intend;

(i)(Ibaḥat, Permission as Allāh' says, وإذا حللتم فاصطادوا "And when ye have left the sacred territory, then go hunting (if ye will);[12]

(ii) Ta'jiz, to make someone incapable of something as the expression of Allāh ; كونوا حجارة او حديدا "Be ye stones or iron."[13]

(iii) Tahdīd, caution, as Allāh says, اعملوا ما شئتم انه بما تعملون بصير "Do what ye will Lo! He is Seer of what he do."[14]

(iv) Ta'ajjub, exclamation, as you say, ما احسن زيد "How good is Zayd," or as they say concerning the expression of Allah, اسمع بهم وابصر يوم يأتوننا "see and hear them on the Day they come unto Us".[15]

But the imperative sense of the word in these examples is more explicit than its other probably meanings.

Thus the "explicit" word (al-Lafz al-Ẓāhir) will indeed be applied to commandment ('amr) except when there is definite indication that it means something other than commandment. The word will then change from it explicit sense to what is indicated.

(11) Ibid, 9 ; 5.
(12) Ibid, 5 ; 2.
(13) Ibid, 17 ; 50.
(14) Ibid, 41 ; 40.
(15) Ibid, 19 ; 38.

C H A P T E R - II

T H E   I M P E R A T I V E   O R   A L - ' A M R

SECTION. I : IMPERATIVE (AL-'AMR) AND ITS KINDS.

Now it is established that al-'Amr means, "demand for action; an expression of superiority or annoyance or insistance,"

Al-'Amr is of two kinds:

(1) OBLIGATORY, Wājib and

(2) RECOMMENDATORY, Mandūb Ilayh.

Wājib necessarily is that imperative, "disregard of which necessarily results in the infliction of some punishment", e.g. the expression of Allāh; اتيموا الصلوا تواتوا الزكوة "Eastablish worship and pay Zakat". (16)

And Mandūb Ilayh is that imperative disregard of which does not necessirly results in the infliction of some punishment". Like the expression of Allāh;
فكاتبو اهم ان علمتم فيهم خيرا و اتو هم من مال الله الذى اتا كم
"Write it for them if ye are aware of aught of good in them and bestow upon them of the wealth of Allāh which He hath bestowed upon you." (17)

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(16) Ibid, [illegible] : [illegible].

(17) Ibid, 172 :; 363.

The imperative word (lafz al-'Amr) is generally more explicit in indicating wajūb than Nudub. (M/3a).

Thus , wherever the imperative word occurs free from any indivation, it definitely means "Wajūb", and 'Nudub' is understood only when an indication is there.

But Qāḍī Abū Bakr suggests that it (imperative word free from indication) indicates neither Wujūb nor Nudub till there is an indication to decide its indicated sense.

Abū al-Ḥasan ibn al-Munajjab and Abū al-Faraj(C/1b) hold that it (imperative word free from any indication) would mean Nudub and would not mean Wājub except by an indication.

The proof of what we say is the expression of Allāh, ما منعک ان لاتسجد اذ امرتک "What hindered thee that thou didst not fall prostrate when I bade thee." (18) Allāh chastised Iblīs and rebuked him for not obeying Allāh's order of prostrating himself.

If the imperative word (lafz al-'Amr) (free from indication did not mean wājub (obligation), Iblīs would not have been taken to task for disregarding the action which was not obligatory on him.

SECTION 2 : PARADIGM OF IMPERATIVE AFTER PROHIBITION (AL-ḤAZR).

Wherever the imperative word (افعل) or do occurs after the prohibition it indicates obligation in accordance with its original sense.

(18) Ibid, 7 : 12.

Some of our (Malikite) jurists are of the opinion that it indicates (al-Ibāhat,'the permission.' A group of Shafi'ite jurists also holds the same view.

The proof of our viewpoint is our agreement on the fact that the simple Imperative expression demands obligation. The imperative expression (in the verse quoted in the above section) is simple. It, therefore indicates obligation and its meaning is not at all affected by the precedence of prohobition, as is the case when 'amr precedes prohibition.

SECTION. 3 : ABSOLUTE IMPERATIVE (Al-'AMR AL-MUTLAQ).

(1) Al-'Amr al-Mutlaq does not demand immediate execution.

This is therefore held by Qādī Abū Bakr Muhammad Ibn Khuwaz̲s al-Mandād. He says that this is the view of the Western Malikites. Most of the Malikities of Baghdād hold that it demands immediate execution.

The proof of our view is the fact that the word (do-افعل) only includes time taken for execution of an order just as the information of an actbn also includes time. If, for example, a certain prson informs that he is standing, he will not be considered a liar if his Qiyām (standing) occurs after his report. Similarly, if some one is asked to stand he will not be considered indifferent to the order if his Qiyām(standing) occurs afterwards.

(2) Having a ascertained this, wājib (obligatory) if performed with delay, is of a nature in which the action has to take place necessarily; when (in the opinion of the author) the addressee (C/2a) will not be obeying an order or will delay it to the extent of no action, then just as the Imām can punish the culprit and the teacher can punish the boy, the punishment may be awarded only if it is assured that the punishment would not cause death. But if he is sure that the punishment would cause death, it is prohibited.

SECTION. 4 : ABROGATION OF THE IMPERATIVE (NASKH WUJŪB AL-'AMR.

Whenever Wujūb al-'Amr is abrogated, it may be regarded as a proof for indicating permission (Jawāz).

Some of our authorities including Qāḍī Abū Muḥammad hold that it is not (considered) permissible.

The proof of our view point is that the order for an action demands (i) obligation for action and (ii) its lawfulness. Lawfulness or Jawāz can be inferred from 'amr (the imperative) only. The imperative sometimes means permissible (Jā'iz) and not obligatory (wājib). It is absurd that what is wājib (obligatory) is not Jā'iz (permissible), since it is impossible that the order is given for doing an action which is not lawful (Jā'iz). Here 'Lawful' means, "what agrees with the Sharī'ah".

Now when it is established that wujub (obligatory) is particularly abrogated, the expression remains valid in its decision (hukm) of permission (Jawaz), because the obrogation (Naskh) does not concern permission (Jawaz), it only concerns wujub (obligatory) and nothing else.

SECTION . 5 : THE TRAVELLER AND THE PATIENT.

The traveller and the patient are under the commandment of fasting in the month of Ramadan, but have been given the choice of fasting during Ramadan or in some other month.

Some of our authorities hold that the traveller is under the commandment of fasting but not the patient (M/3b).

Al-Karakhi (19) says that the commandment of fasting is not addressed to both.

The proof of what we say is that if the traveller fasts he will be rewarded for his action and his fasting will fulfil the obligation. But if he is not under the commandement of fasting, he will not be rewarded. As the menstruent is not addressed to the commandment of fasting, she will not be rewarded.

(19) 'Ubayd Allah, ibn al-Husayn Abu al-Hasan (260/874-340/952) al-Karakhi was a well known 'Iraqi Jurist and the leading authority of Hanafite school; he wrote some books of jurisprudence and died in Baghdad. (Zirakali, al-'Alam, Cairo, 1378/1959, Vol,4 p.347).

SECTION. 6 : DISBELIEVERS (KĀFIRS) ARE UNDER THE COMMANDMENT OF BELIEF (IMĀN).

There is no disagreement among the 'Ummah on the point that Kafirs are under the commandment of Īmān.

The explicit view of Imām Mālik (C/2b) is that they (disbelivers) are addressed to fast, to pray, to pay Zakāt and to follow other Islamic Laws. Muḥammad Ibn Khuwayz Mandād (on the contrary) holds that they (Kāfirs) are not under the commandment of any Islamic Law.

The proof of what we say is the expression of Allāh; "What hath brought you to this burning? They will answer; we were not of those who prayed, nor did we feed the wretched."(20)

Allāh, the Exalted has thereby informed that the punishment is to be inflicited on them (the disbelivers) for disrrgarding Īmān (belief), Ṣadaqah, (poor tax) and Ṣalāt (prayer)

SECTION . 7 : THE COMMANDMENT OF THE HOLY PROPHET(May peace be upon him) OR ('AMR AL-NABĪ).

When a companion of the Holy Prophet says that the Holy Prophet (may peace be upon him) ordered us to do so and prohibited us from a certain action, it is to be applied to Wujūb (obligatory).

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(20) Al-Qur'ān, 74 : 42-4p

ما سلككم في سقر قالوا لم نك من المصلين ولم نك نطعم المسكين

It is said that Abū Bakr ibn Dawūd does not apply the same to wujūb (obligatory) unless of the Messenger of Allāh (may peace be upon him) is reported to have made it wujub.

What Abū Bakr holds is not correct, since there are many lexicographical methods to know the commandment. We mostly argue and distinguish between imperatives and other moods through the lexicographical expression of 'Imru'l Qays, and al-Nābighah, but it is better and more apt to argue with the expression of Abū Bakr and 'Umar (may Allāh be pleased with them) as they were most eloquent Arabs, and also because one achives faith and excellence by following them.

C H A P T E R - III

T H E O B J E C T S O F P R O H I B I T I O N

The confirmed views of the Ahl al-Sunnah is that an order of doing something means "prohibition of its opposite and prohibition of something means doing of its opposite."

Prohibition (Nahy) is of two kinds;-

(1) Prohibition in so far as the object is disliked or Nahy 'alā wajh al-Karāha.

(ii) Prohibition in so far as the object is unlawful or Nahy 'ala wajh al-Tahrim.

Whenever Nahy occurs, it is to be applied to Tahrim (voide) except when prohibition is accompanied by an indication it would turn to Karahiyya (dislike).

When Prohibition, Nahy is there it indicates a state of coruption in the forbidden object.

This is what has been said by the majority of the Jurists from among our authorites and others. Qadi Abu Bark, however, says that it does not indicate the state of corruption.

The preof of what we say is the agreement of the Ummah, the companions and their followers on the fact that the prohibition(Nahy) in the Qur'an and the Sunnah alone indicate the voidness of the prohibited contract. For example, they agree on the voi voidness of the contract of usury (Riba) owing to the injunction of Allah. "And give up what remaineth (due to you) from usury".(21) And the prohibition (M/4a) of the Holy Prophet (may peace be upon him) from selling gold in exchange of gold at an enhanced rate.(22) Again Ibn 'Umar declares it unlawful to marry the polytheist women and believes in its voidness because of the injuntion of Allah, "Wed not idolatress"(23) (C/3a) and a number of other instances which cannot be surrounded here.

(21) Ibid, 2 ; 276; وذروا ما بقي من الرباء

(22) Mishkat al-Masabih , Delhi, 1932, p. 245 ; عن عبادة بن صامت ان رسول الله قال لا تبيعوا الذهب بالذهب

(23) Al-Qur'an, 2 : 221

CHAPTER - IV

ON GENERAL SENSE OR AL-'UMŪM

SECTION : I : WORDS OF THE GENERAL SENSE OR ALFĀẒ AL-'UMŪM.

We have mentioned that the word having more than one meaning which is explicit in a certain meaning, is of two-kinds;

1) IMPERATIVES, Awāmir; and

2) GENERAL SENSE, ʿUmūm.

We have already discussed Imparatives (Awāmir). Here the discourse is on words of general-sense which has five expressions;-

i. Plural words (Lafz al-Jam').

Like the words, al-Muslimūn (the faithfuls), al-Mūminūn, (the believers), al-Abrār (the pious) and al-Fujjār (the profligate).

ii. Genus words (Alfāz al-jins).

Like the words al-Ḥaywān (the animal), and al-Ibl (the Camel) etc.

iii. Negative words (Alfāz al-Nahy).

Like our expression, ما جاءني من أحد (No one came to me).

iv. Equivocal words (Al-Alfāẓ al-Mubhamah).

Like the words مَن (he, who) for the rational, ما (that which) for the irrational, and أيّ (whichever) for both, متى (when) for time and أين (where) for space.

v. Common Noun (Singular), when preceded by definite article (Al-Ism al-Mufrad bi'l-Alifwa'l Lām).

Like our expression, <u>al-Rajul</u> (the man), <u>al-Insān</u> (the human being) and al-Mushrik (the polythiest). Whenever this form (al-Ism al-Mufrad) occurs, it aims at two things;

(1) It may mean only one with an indication to specify it.

(2) It may mean the whole of the genus, when there occurs no indication.

The proof of this viewpoint is the admitted fact that these (Alfaz al-Mufrad bi'l-Alif Lām) are definite (Ma'rifah) either by "determination" (ال) or by "encompassing the genus" (استيعاب الجنس).

In the absence of "determination" ('ahd), it will be applied to encompassing the genus, otherwise it will be regarded as indefinite (Nakirah).

(vi) Relative Words (Alfāz al'Iḍāfah).

Like the expression of the Holy Prophet ;

في سائمة الغنم الزكاة "Zakāt falls on pasturing sheeps and goots".(24)

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(24) Bukhārī, <u>al-Ṣaḥīḥ</u>, Delhi, 1938, Vol, I, P. 196; Bayhaqī, <u>al-Sunan al-Kubrā</u>, Hyderabad (Daccan), 1350 A.H, Vol, IV, P. 89.

SECTION. 2: RULE OF THE WORDS OF THE GENERAL SENSE.

After establishing this whenever a certain word of general sense as mentioned above occurs it will be applied to its general sense except when an indication particularises its meaning. It would then mean the same thing which is indicated.

Qāḍī Abū Bakr holds that the word would remain confined to its meaning and would not be applied to its general or particular sense till the actual meaning is indicated.

Abū al-Ḥasan ibn al-Muḳab says that it would be applied to the minimum of what is understood by these (general) words.

The proof of our viewpoint is the same as already discussed (C/ða) viz Words of General Sense ('Am words) become definite (M'arifah) when they encompass the genus, and distinguish the meanings which belong to such words from those which do not belong to them. If the whole genus is not meant then the words undoubtedly remain indefinite (Naḵirah) and would not distinguish between the meaning which belong to them from those which do not belongs to them. On this very basis we say that when a general word is indefinite it does not encompass the whole genus; had it encompassed the whole genus; it would be definite (ma'rifah).

SECTION. 3 : PARTICULARIZATION (TAKHSĪS) OF WORDS OF GENERAL SENSE (ʿĀMM).

When (M/4b) there is an indication of particularizing the words of general sense, the general word will remain (after particularisation) in the same state as if it was not particularised. It will also be used as an evidence as if it were not particularized in any respect.

For example Allāh, the Exalted, says, "slay the idolaters". (25) The word اقتلوا (slay) demands killing of every polytheist, but it has been particularised by the prohibition of killing those ahl al-Kitāb (the people of the Book), who have paid the poll tax (Jizyah), since the verse is an evidence for the obligations of killing the polytheists excepting those who have been excluded by the said particularisation.

Similarly, if another specification (of a general word) occurs, the rest of the General Word (lafz al-ʿĀmm) will appertain all its meanings which it indicated before specification.

It is permissible that particularization and explanation may occur along with the general word. It is further permissible that the action on the particularised order may be delayed. If, however, the time of action is specified, the delay will not be permitted.

(25) Al-Qurʾān, 9 : 4; اقتلوا المشركين

SECTION. 4 : THE MINIMUM NUMBER OF THE PLURAL (ALFAZ AL-JAM) IS TWO.

According to a group of Malikite scholars the minimum number of the plural is 'two'.

Qadi Ibn al-Tayyib states that this is the view of Malik. Some of our authorities and the Shafi'ites, however, hold that the minimum number of plural is 'three'.

The proof of what we have held is the expression of Allah;

داود و سليمان اذ يحكمان في الحرث اذ نفشت فيه غنم القوم
وانا لحكمهم شاهدين -

"and David and Soloman when they exercised their judgment concerning the crop when the sheep of people strayed therein and we were witness to their judgement" (26) (C/4b).

And his another expression,

"Go then both of you, with our signs, we are with you and we hear" (27). اذ هبا باياتنا انا معكم مستمعون

It is narrated that this view (i.e. minimum number of plural is two) is also held by Khalil and Sibiwayh. They (both) received the following verse (of Himyan ibn Quhafah) (28) in their support;

و مهمهين قذفين مرتين — ظهرا هما مثل ظهور الترسين

"The two deserts were waste and barren; their backs were like the backs of Shields." (28)

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(26) Ibid, 21 ; 78.
(27) Ibid, 26 ; 15.
(28) Sibiwayh, Kt Sibwayh, Cairo, 1316 A.H, Vil,II, p. 202.

SECTION. 5 ; PLURAL WORDS.

Whenever a masculine plural occurs it does not include the feminine group except in the case of an indication, since each group (masculine and feminine) has a particular word specified by the language. Allāh says;

ان المسلمين والمسلمات والمؤمنين والمؤمنات

"Surely, men who submit themselves to God and women who submit tuemselves to Him and believing men and beliving women." (29)

Some of the linguists hold that the wāw of al-Jam'al-Sālim indicates five objects;

(i) Tadhkīr (masculine),

(ii) Salāmat (freedom from defect),

(iii) Raf' (nominative case),

(vi) Jamʿ (plurality) and

(v) ʿAql (rationality).

Thus it is not possible to apply it (i.e. wāw of al-Jamʿ al-Sālim) to a feminin (muaʾnnath) except by an indication . Similarly it does not apply to what is rational, or irrational except by an indication.

SECTION. 6 ; APPLICATION OF WORDS.

This having been established, it is sometimes found that statement is primarily general ('Āmm) and is subsequently particular (Khāṣṣ). In the same way that which may appear particular, in the beginning,

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(29) Al-Qur'ān, 33 ; 35.

may turn out 'general' subsequently. Thus each word will necessarily be applied to its appropriate meaning without considering anything else. Take for example the expression of Allāh, "And the divorced women shall wait concerning themselves for three menses". (30) This (expression) is general ('Āmm) to every divorced women who has completed three menses (Qurū') whether she has been dicorced with a Rajʿī ṭalāq (Revocable Divorce) or Bā'in Ṭalāq (Irrevocable Dicorce). Afterwords, Allāh says, "And their (husbands) have (M/Sa) the greater right to take them back within the period". (31)

This injunction is particular (khāṣṣ) for the woman who is divorced with a rajʿī ṭalāq.

As for the statement which is primarily general ('Āmm) and subsequently particular (Khāṣṣ), the example is the expression of Allāh, " O, Prophet, when you divorce (your) women, divorce them for prescribed period". (32(

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(30) Ibid, 2 ; 228; والمطلقت يتربصن بانفسهن ثلثة قروء

(31) Ibid,

وبعولتهن احق بردهن فى ذلك

(32) Ibid, 65 ; 1 ;

يا ايها النبى اذا طلقتم النساء فطلقوهن لعدتهن

SECTION. 7 : VARIATION OF PARTICULAR (KHĀṢṢ) AND GENERAL ('ĀMM) WORDS.

When two words Khāṣṣ and 'Āmm vary, the 'Āmm will be based on 'Āmm (the general sense) and Khāṣṣ will be based on Khāṣṣ (the particular sense), — no matter if it precedes or comes afterwards.

Imām Abū Ḥanīfah says when, ('Āmm general) is preceded it abrogates the preceding Khāṣṣ (particular). For instance it has been narrated that the Holy Prophet (may peace be upon him) said, "There is no prayer after the 'aṣr' prayer till the sun sets.(33) This Ḥadīth nullifies all prayers after the 'aṣr'.

In another Ḥadīth the Prophet said, "Whosoever falls asleep without saying his prayer or forgets his prayer, he should perform his prayer when he remembers it."(34) Now, this particular expression abviously excludes the forgotten prayer from the expression that forbids all sorts of prayers after the 'aṣr'; no matter whether the particular expression (al-Khāṣṣ) was given out primarily or subsequently.

Abū Ḥanīfah holds that; (i) when the particular (Khāṣṣ) preceds (in time), (C/5a) it is abrogated by the general ('Āmm)— which is expressed afterwards. (ii) If the general ('Āmm) is agreed upon and the particular (Khāṣṣ) is controversial, the general will be preferred to the particular.

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(33) Bukhārī, al-Ṣaḥīḥ, Delhi, 1938, Vol. I p. 196.
(34) Ibid, من نام عن صلاة او نسيها فليصلها اذا ذكرها

The proof of what we have said is the fact that the particular (Khaṣṣ) contains the decision in a way that allows no interpretation, whereas the general ('Āmm) gives a decision which admits interpretation. Hence, the particular (Khāṣṣ) is preferable.

SECTION. 8 : CONTRARINESS BETWEEN TWO WORDS.

(1) When two words vary in their meanings so much so that it is not possible to harmonise them, and their dates (of expression) are known, the preceding one will be abrogated by the following one.

(2) If their dates (of expression) are, however not known then the reason for preferring one over the other will have to be examined to fix the preference.

(3) If it is possible to do so (to find same reason to prefer), the preferred one will be taken.

(4) If it appear difficult to prefer one to the other, neither of the two will be considered, and a probe will be made into the rest of the evidence provided by the Sharī'ah to find an indication to be considered in that case, since reason ('aql) cannot decided the lawfulness or unlawfulness (in its own discretion).

(5) If, however, it becomes difficult to find an indication in the Sharī'ah evidence, the investigator will have the choice of acting on either of the two-the prohibiting one or the permitting one , as he wishes,

SECTION. 9 : PARTICULARIZATION (TAKHSIS) OF THE GENERAL ('AMM) SENSE OF THE QUR'AN WITH KHABAR AL-WAHID.

(1) The general sense of the Qur'an can be particularized by a 'Khabar al-wahid'. ~~(a hadith transmitted by one rawi).~~ This has been held by the majority of the jurists.

(2) The general sense of the Sunnah can also be particularized by the Qur'an, (C/5b).

(3) The general sense of the Qur'an and Khabr al-Ahad ~~or these ahadith which have been reported by a single Sahabi~~ can be particularized by explicit and implicit reasoning (Qiyas al-Jali wa al-Khafi).

This (particularization) in fact is to harmonize the two evidences. When hormonization of the two evidence is possible it is better to abandon one and ~~to~~ take the other, since the evidence are taken into consideration for giving decisions. It is, therefore not legal to abandon a single evidence as long as it is possible to act upon it.

SECTION. 10 : PARTICULARIZATION THROUGH THE ACTIONS (AF'AL) AND APPROVALS (IQRAR) OF THE HOLY PROPHET.

(1) Particularizatin can be caused by certain other means i.e. by the actions (al-Af'al) of the Prophet (may peace be upon him) and by his approval of a decision (al-Iqrar 'ala al-Hukm) and so on.

(2) Particularization will not be caused by the view of the narrator (madhhab al-Rawi) like the narration of Ibn 'Umar concerning the hadith in which the Prophet said, "The buyer and the purchaser have the right of choice so long they have not parted". (35) (M/5b). Ibn 'Umar said, "parting in bodies" is meant.

Some of our authorities and Shafi'ites have, however held that this can cause particularization. Malik does not agree with this and holds that this will not cause particularization. His view is correct, since the the decisions are to be derived only from 'the authority of the Shar' (Sahib al-shar' i.e. Holy Prophet) and it is not legal to abandon the view of the authority of the Shar' for the sake of a view uttered by somebody else.

SECTION. 11 : CLASSIFICATION OF THE WORDS OF THE GENERAL ('AMM) SENSE ON THE BASIS OF CAUSE (SABAB).

This discourse relates to the general ('amm) word that occurs in the beginning (Ibtida').

As for that which precedes a cause (Sabab), it is of two kinds;-

(i) Independent by itself, Mustaqill binafsihi and,
(ii) Not independent by itself, Ghayr mustaqill binafsihi.

(35) Mishkat al-Masabih, Delhi, 1323 A.H., p. 244;

المتبايعان بالخيار مالم يتفرقا

As for Mustaqill bi Nafsihi, it is like that hadith which has been narrated from the Holy Prophet (may peace be upon him) that when he was asked concerning the bir buda'ah, he said, "The water is pure, nothing pollutes it."(36)

Now, concerning the above mentioned words of the general sense ('Amm lafz), our authorities (Jurists) have difference of opinion. It has been narrated from Malik that this kind of word is confined to its cause and is not applicable to its general sense. It has also been narrated from him that such a word will be applied to its general sense and will not be confined to its cause. This latter view has been on/held by Qadi Isma'il and most of our authorities. The proof of this is the fact that decisions (Ahkam) are based the word of the authority of the Shar' (the Prophet) and not on "cause", since the word of the authority of the Shar' indicates the decision while the cause (by itself does not) indicate a decision. It is, therefore, necessary to consider only that which concerns the decision and not the "cause".

As for Ghayr mustaqil bi nafsihi, it is like the Hadith in which the prophet (may peace be upon him) was enquired about the sale of rutab (juicy or green date) in exchange of tamar (dry-date). The prophet there upon asked, "Does rutab lose its weight when it is dried? They said, 'Yes'. He said, " then do not" (sell rutab in exchange of tamar).(37) By this answer it is established

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(36) Ibid, p. 56; الماء طهور لا ينجسه شئ

(37) Ibid, p. 245;

that "cause" has been taken into account on determining "particularization" and "generalisation" and we do not find disagreement on this issue.

CHAPTER - V

THE EXEMPTION OR AL-ISTITHNĀ'

SECTION. 1 : KINDS OF EXEMPTION (AL-ISTITHNĀ').

Among the things which are related to particularization (al-Takhṣīṣ), Istithnā' or (exemption finds a place. This is of two kinds;-

(1) Exemption by which particularization (takhṣīṣ) is ~~affected~~ caused, and

(2) Exemption by which particularization is not ~~affected~~ caused.

"Exemption by which particularization (takhṣīṣ) is ~~affected~~ caused" is again of two types;

(i) Istithnā' min al-gins or Exemption from the genus and,

(ii) Istithnā' min al-jumlah or Exemption from the whole sentence.

The example of Istithnā' min al-gins is like our expression, "I saw the people except Zaid" and that of Istithnā' min al-Jumlah is, " I saw Zaid

except his hand"; (رأيت زيدا الا يده.)[38]

As for Istithnā' min ghayr al-jins it does not affect particularization (takhṣīṣ), as nothing can be exculded after having been comprehended by the sentence. But, in my opinion it is possible to particularize a part thereof. Muhammad Ibn Khuwayz Mandād, however, says that it is not possible. Our argument is the expression of Allāh : "It does not become a believer to kill a believer unless it be by mistake."[39] For mistake (Khaṭā) is somethint about which (M/6a) it cannot be said that the believer will commit it or that he will not commit it, as it does not came under taklīf (C/6b) (obligation of doing or not doing).

Nabighah says:-

وقفت فيها اصيلالا اسائلها ـــــ عيت جوابا وما بالربع من احد

الا الاوارى لايا ما ابينها ـــــ والنؤى كالحوض بالمظلومة الجلد

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(38) In the first example, رأيت الناس إلا زيدا , Zaid, an individual, has been exempted from the people (al-Nās), the Genus. In the sedond sentence, رأيت زيدا الا يده , word "his hand (yadahu)" has been exempted from the sentence رأيت زيدا which expressed, "I saw Zaid", except his hand (Yadahu).

(39) Al-Qur'ān, 4 : 93;

وما كان لمؤمن ان يقتل مؤمنا الا خطأ

"I stood amidst the ruins (of the dwellings of my beloved) for a while asking them (about the inmates). They were obviously unable to utter a reply. Then there was nobody in the dwelling except the tent peg, the canal, the tank which I could find at the dark and stiff ground".(40)

SECTION, 2 : ADJOINING EXEMPTION (ISTITHNA' AL-MUTTASIL.)

Istithna' muttasil is a "function of speech (in which) a part depends upon another part". It must be reffered back to the whole speech in the opinion of our authorities.

Qadi Abu Bark prefers in this respect to keep quiet. Later Hanafites, on the other hand, say that it will be referred to the nearest part of the speech.

The following verse is cited by way of example;

"Flog them with eighty stripes, and never admit their evidence(thereafter) and it is they who are evil-doers."(41) "فاجلدوهم ثمانين جلدة ولا تقبلوا لهم شهادة ابدا واولئك هم الفاسقون"

The proof of this view is the fact that the portion which is interdependent (or the portion some of which depends upon some other) is treated as if the whole of it has been mentioned under one name. According to them (the Jurists) there being no difference between the saying "you beat Zaid and 'Amr and Khalid," and the saying, "you beat all the three".

(40) Nabighah, Diwan al-Nabighah, Bairut, 1953, pp.37-8.
(41) Al-Qur'an, 24 : 4.

When the matter stands like this and the istithna' (exemption) occurs after a particular speech in which some part depends upon some other, we (the Jurists) unanimously hold that the examption i.e. Istithna refers to the whole speech.

CHAPTER- VI

THE FUNCTION OF MUṬLAQ (ABSOLUTE) AND MUQAYYAD (CONDITIONED)

To the khaṣṣ (particular) and 'Amm (General) are also related the muṭlaq (absolute) and muqayyid (conditioned). We shall now, by will of Allah, explain their effects. The muqayyad is considered so by the following three conditions:

(i) Al-Ghayah (The End),

(ii) Al-Sharṭ (The stipulation) and

(iii) Al-Ṣifat, (The Attribute).

As for al-Ghayah or the End (C/7a) you say (for instance); "Beat Zaid continuously till he resorts to the truth". Now, had the beating not been conditioned with "resorting to the truth" it would have meant "beating without end."

The case of al-Shart or the stipulation is as you say; "Whosoever from the people comes to you, give him a dirham". The order is conditioned with a Shart (stipulation) of "coming".

The case of the Sifat or the attribute is as you say, "Give the believing Quraishites." The Quraishites have been conditioned with the attribute of "believing" Had it not been so, the word would have meant every Quraishite.

Having established this, whenever Mutlaq (the absolute) and Muqayyad (conditioned) words occur, they will be either of one genus or of two genera.

(1) In case they belong to two genera then there is no disagreement in the matter that mutlaq (absolute) will not be ~~applied to~~ taken as Muqqayad (conditioned). For instance the condition of ~~(dispensing)~~ justice in case of giving evidence does not make the condition of 'faith' or Iman.

(2) If they belong to one and the same jenus and are related to two different causes, then Mutlaq according to the majority of our authorities, will not be applied to muqayyad except when it is demanded by an indication.

Its examples are the cases of 'Raqabah' (M/6b) in case of murder, and Zihar. ~~in case of divorce.~~

Some of our authorities and the followers of al-Shāfi'ī, however, held that the Mutlaq will be applied to Muqayyid in so far as lexicography indicates.

The proof of what we have said is the fact that a Mutlaq Hukm (an absolute decision) is not a Muqayyid' or conditioned one. So the application of the 'Mutlaq' requires the negation of any condition (taqyīd) just as the Muqayyid, [illegible] necessitates the negation of Itlāq (the state of absolute).

Thus, it is necessary to declare Mutlaq a Muqayyid, because the Mutlaq belongs to the Muqayyid, ~~Similarly~~ an Muqayyid ~~will~~ be considered a Mutlaq because ~~they~~ belong to the same jenus.

(3) But when the Mutlaq and Muqayyid are related to a single cause such as Zakāt which is conditioned (Muqayyid) with ~~Fasting~~ and occurs as absolute (Mutlaq) in different places then, according to the majority of our authorities, it is not necessary to apply Mutlaq to Muqayyid.

On the contrary it is considered necessary by some of our authorities. This (issue) will be elaborately discussed in its own place, if Allāh, the Exalted, wills so.

CHAPTER - VII

ON THE FUNCTION OF MUJMAL(CONCI

We have already mentioned that al-Haqiqah (real meaning) is of two kinds:-

(i) Mufassal or explained

(ii) Mujmal or unexplained (Concise)

The discourse on the Mufassal (Explained) has already been recorded. Here the discussion is on Mujmal, . Precisley the mujmal is," a word which does not make its intention well understood and needs something else for clear diction."

For instance Allah's expression' " And pay the due thereof upon the harvest (42). Here the word Haqq itself does not clarify its sense and needs an explanation to clarify its genre and value.

So whenever such a case occurs, it is necessary to believe it as a obligation (wajib) till it is explained hence necessary to be followed.

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(42) Ibid, 6 : 142.

وآتوا حقه يوم حصاده .....

Our authorities have, however, differed in the (meanings of the following) expressions of Allāh:

(i) "And pay the Zakāt" (43) ; واتو الزكاة

(ii) "Fasting is prescribed for you;" (44) كتب عليكم الصيام

(iii) "And pilgrimage to the House is duty unto Allāh for mankind" (45), ولله على الناس حج البيت and

(iv) Allāh permitteth trading and forbiddeth usury" (46)

احل الله البيع وحرم الربوا

Some of our authorities are of the opinion that these above (verses) are Mujmal (concise). Abū Moḥammad ibn Naṣr (47) holds all the above verses are Mujmal except the verse' احل الله البيع وحرم الرباء which is 'āmm (general).

Ibn Khuwayz Mandād says that all the above verses are 'āmm (general) and it is necessary to take them in their general meanings except that which is particularised by an indication. The last is the correct view.

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(43) Ibid, 2 ; 110.

(44) Ibid, 2 ; 183.

(45) Ibid, 3 ; 97.

(46) Ibid, 2 ; 275.

(47) Abū Muhammad Ibn Naṣr: Muhammad b. 'Abd Allāh 'b. Muhammad b. Naṣr 'b. Warqā al-Aswdānī was one of the leading authority of Shāfi'ites school of his age . He died in Ramaḍān, 385 A.H. in Bukhara.
(Ibn Khalikān, Wafayāt al-Ayān, III : 346 XXXXXXX Cairo, 1948). ; Vol. III, p. 346).

The proof of this (view) is the fact that each one of these mujmal words in the lexicon indicates a particular sense; Ṣalāt, for example, means prayer. whenever this word occurs it will be followed by doing that which is called, "prayer" except when it is particularly used it for a specified prayer having particular actions of kneeling down and prostrating oneself and so on. Fasting likewise means "to abstain", but the Sharī'ah particularly uses it for an abstention from specified objects in a specified time. similarly 'Zakāt' means (M/7a) to "increase" (wealth), and 'Ḥajj' "to intend" the House of Allah in a specified "way". Hence these expressions are like Allah's expression اقتلوا المشركين "Slay the idolaters,"(48) which indicates killing of every polythiest, but the Sharī'ah has specified a few kinds of polythiests.

C H A P T E R - VIII

W O R D S O F C O M M O N U S A G E O R A L ' U R F'

SECTION. 1 : MEANING OF AL-'URF.

All that is related to this chapter (the Book) is the discussion of commonly used proper nouns (al-

(48) Al-qur'ān, 9 : 5.

'Asmā' al-'Urfiyyah). Our expression 'Urfiyyah' means that " a word is coined in the Arabic usage for a certain kind of article and then it is predominantly used for a particular type of that very kind of article."

Take for instance the word 'Dābbah' which means all that moves'. Then it was predominantly used for a particular kind of animal excluding everything else. Similarly our expression 'Ṣalāt' is a noun used in the lexicon for every kind of prayer but now it is predominantly used for a particular kind of prayer performed in a particular manner.

SECTION. 2 : KINDS OF AL-'URF OR THE COMMON USAGE.

Having established the above the common usage (al-'Urf) is understood in three ways.

Firstly by way of al-Lughah or the Lexicon for instance we say 'Dābbah' (animal).

Secondly by way of the Sharī'ah, or Law as we say Ṣalāt (Prayer) Ṣawm (Fasting) and Ḥajj (Piligrimage).

Thirdly by way of Ṣanā'ah or the profession like the example that Ahl al-Kitāb call 'dīwān' (register) as 'Zamām', while camel-men

use the same word (Zamām) to mean al-Khitām (a nose-rein of a camel).

When such commonly known words occur, they will convey the sense for which they are commonly, used.

B. AL-SUNNAH OR MODEL CONDUCT OF THE HOLY PROPHET

CHAPTER - I

ON THE FUNCTION OF THE PROPHETIC ACTIONS

SECTION. I : KINDS OF AL-SUNNAH.

The sunnah reported from the Prophet (may peace be upon him) falls into three kinds;-

(i) AQWAL OR EXPRESSIONS,

(ii) AF'AL OR ACTIONS,

(iii) IQRAR OR APPROVAL.

The discussion on Aqwal or "Expressions" has already been completed. Here the discussion on Af'al or "actions" begins. It is divided into two parts;

(1) Firstly the acts done by the prophet to explain the mujmal (concise or unequivocal) expressions. Its function is therefore that of mujmal in cases of wujub (obligation) nudub (recommended) and ibahah (permission);

(2) Secondly the acts done by the prophet for the first time which again are of two kinds;-

(a) acts done by way of worship such as prayer, fasting,etc.

Our 'Ulema have disagreed concerning its effect. Ibn al-Qassari and Al-Abhari (49) and others consider the action as Wajib, (obligatory) while Ibn al-Muntab holds it Nudub (Recommended) Qadi Abu Bakr says that it indicates *waqf* i.e. to consider the circumstances and evidence to decide in favour of one or the other. The first (opinion) is correct, as evidenced by the Qur'anic verse; "And follow him that you may be rightly guided." (50) "The imperative mood (al'amr) indicates the obligation. Another proof is also Allah's expression", "So let those who go against His Command." (51)

The imperative (al-amr) is in fact used for action (M/7b) and expression. This is based on the consensus of opinion (of the Companions), as they referred to the expression of 'A'ishah (Allah be pleased with her) when they disagreed concerning the obligation of *ghusl* (bath) after sexual intercourse without ejaculation that "the Messenger of Allah and I did it and we took a bath." (52)

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(49) Al-Abhari : Muhammad Ibn 'Abd Allah ibn Muhammad ibn Salih Abu Bakr al-Tamimi al-Abhari; an Malikite authority of Iraq, settled in Baghdad and wrote many books on Malikite School of Law. (Zirakali, *al-A'lam*, Cairo, 1378/1959, Vol, VII, p.98).

(50) Al-Qur'an, 7 : 158; واتبعوه لعلكم تهتدون

(51) *Ibid*, 24 : 64. فليحذر الذين يخالفون عن أمره

(52) *Mishkat al-Masabih*, Delhi, 1310 A.H. p. 41;

اذا جاوز ختان الختان وجب الغسل فعلته انا ورسول الله صلى الله عليه وسلم فاغتسلنا.

It was accepted by all Ṣaḥābah and (thereupon) taking baṭh (after this action) was considered as obligatory (wājib).

(b) Those actions which are not characterised as devotional such as eating, drinking, and clothing (of the Holy prophet), and it indicates Ibāḥah or permission.

Some of our authorities have inclined to hold that these (actions) indicate recommendation' (nudub), such as acting with right hand and starting to put on shoes with the right foot. But other (Jurists) declare that this is not correct, because" recommendation" here is not at all concerned with the action itself. It is only concerned with the description of the action, which is a form of worship.

SECTION. 2 : THE PROPHETIC APPROVAL (IQRĀR).

As for the approval (al-Iqrār) it means that "an action was done in the presence of the prophet (may peace be upon him) which he did not refute". This undoubtedly is the proof of validily (lawfulness) of the action, since the prophet would not approze something unlawful.

This is for example, like the incident recorded from the prophet that he finished the ṣalāt by uttering السلام عليكم و رحمة الله after two rak'at. He was therefore asked (in the course of prayer) by a companion known as 'Dhul

Yadayn' "O the Messenger of Allāh'. Have you forgotten or the ṣalāt has been shortened?" The Prophet did not forbid him from speaking during the course of the prayer just to let the Imām understand his mistake.(53) This indicates the validity and lawfulness of speaking in the course of the prayer (when it is needed).

SECTION. 3 : THE AKHBĀR OR STATEMENTS OF THE PROPHET.

The khabar or statement is "a reported description", which is of two kinds;

(i) Truth (ṣidq), and (ii) Falshood (kidhb).

'Truth' is a reported description which agrees with it reality (actual wording of the statement).

'Falsehood' is a reported discription which does not agree with its reality (actual wording of the statement).

Having established the above, a Khabar is again of two types;-

(1) MUTAWĀTIR or continuous transmission unanimously reported by the narrators.

(2) 'ĀḤĀD or tranmission reported by a single narrator.

Now 'Tawātur' is that "which is well-known in the same way as it has been transmitted", such as the

(53) Ibid., p. 92.

unanimously reported information about the existence of Mecca, Khurāsān, Egypt and that which has been stated about Muhammad (peace be upon him) and the revelation of the Qur'ān.

The Khabar Wāhid is that " which falls short of 'tawātur' or continuity." It ~~is~~ does not ~~based on~~ give sure knowledge and is ~~more based on guess,~~ preferable to its listener who considers ~~guesses sound of~~ the words that have been reported as sound. ~~So~~ But so far as the authenticity is concerned the listeners is open to mistake and omission like a witness. Ibn Khuwayz Mindād, however, hold ~~holds~~ that knowledge is attained by Khabar wāhid. But the first view is held by ~~most~~ the majority of the Jurists.

SECTION. 4 : MUSNAD KHABAR.

Having established this, a Khabar is of two kinds:- (i) Musnad and (ii) Mursal.

(1) MUSNAD is "a Khabar in the case of the chain of the narrator reaches the Prophet (continuously)."

(2) MURSAL is "a Khabar in the case of which the chain of narrator does not reach the Prophet (continuously)".

It is obligatory to act upto it(musnad hadīth) Sharī'ah (the law) has enforced it.

A group of people of innovation (Ahl al-Bid') has declined to act upto it.

The proof of what we have said is the fact that rationally it is not absurd to act in accordance with the statement of one whom we predominantly consider (M/8a) to be realiable and trustworthy even though we have no knowledge of his truthfulness. This is just as we act in accordance with the evidence of the two witnesses whom we predominantly consider realible, although we have no knowledge of their truthfulness. It may be that a number of witness go back on their evidence after it has been accepted and an order has been issued accordingly.

This is obviously indicated by the fact that the Prophet used to send his governors to different parts of the country, who taught the people the religious affairs and the Divine speech (the Qur'ān) and took alms from them. This is also indicated by the consensus of the Ṣaḥābah in enforcing an actions treating it as obligatory on the basis of an individual statement i.e. Akhbār Āḥād such as;

(1) 'Umar withdrew his order in complying with the statement of 'Abd al-Raḥmān ibn Awf, and accepted the jizya (poll-tax) from the Majūs in accordence with his statement.(54)

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(54) Ibid, (Bāb al-jizyah) p. 353. The words of ḥadīth read as follow;

ولم يكن عمر اخذ الجزية من المجوس حتى شهد عبدالرحمن بن عوف

ان رسول الله صلى الله عليه وسلم اخذها من المجوس هجر -

(ii) Similarly the ṣaḥābah turned to the statement of 'Āyishah concerning the obligation of taking bath after sexual intercourse without ejaculation.(55)

(iii) 'Uthmān accepted the statement of al-Farī'ah bint Mālik concerning 'the dwelling'(56) (i.e. wife's performing the 'iddat in the house of the husband after his death), and so on; there are innumerable similar cases that cannot be ~~surrounded~~ mentioned here.

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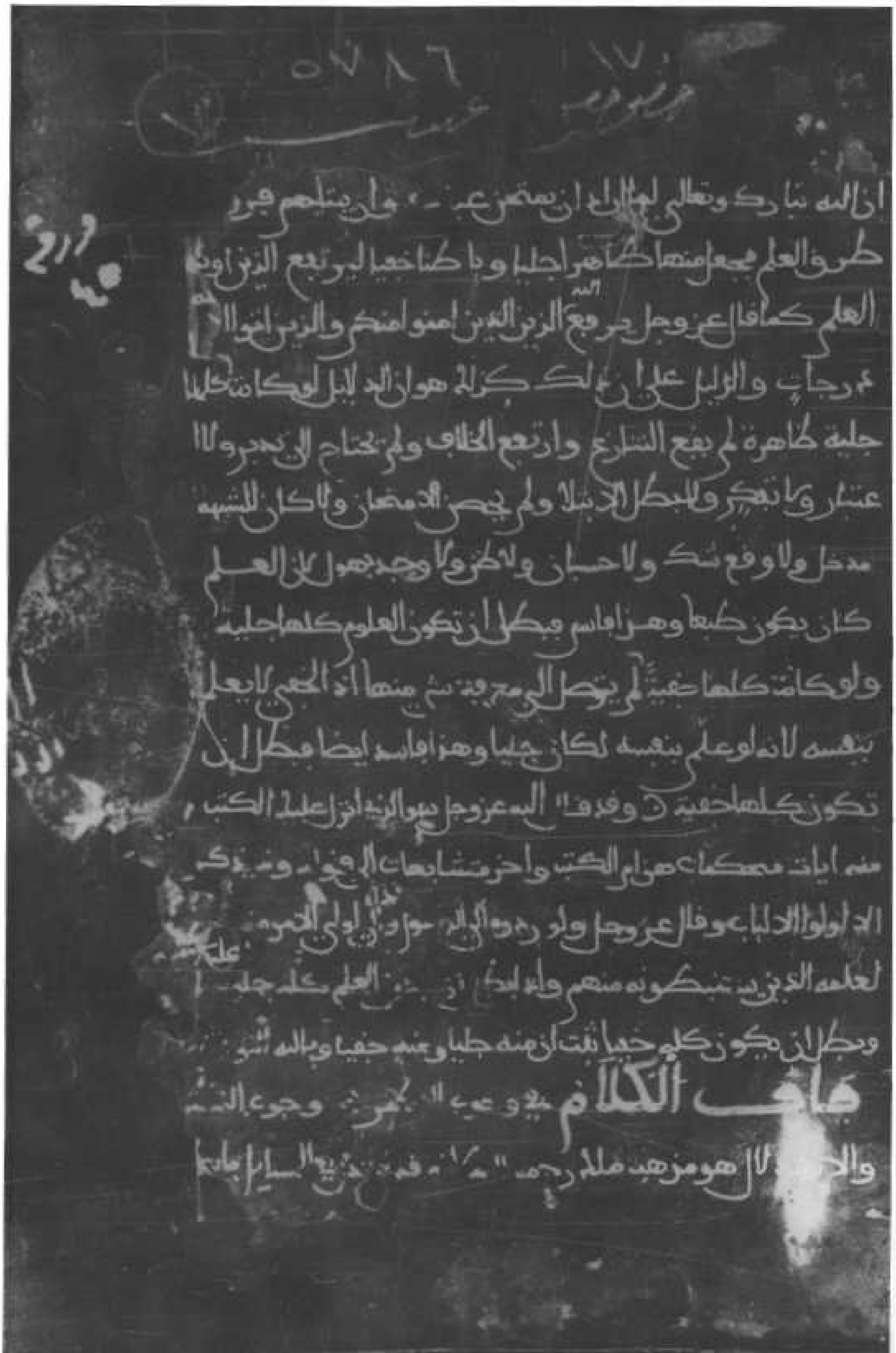
(55) Ibid, p. 41;

اذا جاوز الختان الختان وجب الغسل فعلته انا و رسول الله صلى الله عليه وسلم فاغتسلنا -

(56) Ibid, (Bāb al-'Iddah), p. 289. This ḥadīth has been narrated by Zīnat in these words;

عن زينب بنت كعب ان الفريعة بنت مالك بن سنان وهى اخت ابى سعيد الخدرى اخبرتها انها جاءت الى رسول الله صلى الله عليه وسلم تسئله ان ترجع الى اهلها فى بنى خدرة فان زوجها خرج فى طلب اعبد له ابقوا فقتلوه - قالت فسئلت رسول الله صلى الله عليه وسلم ان ارجع الى اهلى فان زوجى لم يتركنى فى منزل يملكه ولا نفقة فقالت قال رسول الله صلى الله عليه وسلم نعم - فانصرفت حتى اذا كنت بالحجرة او فى المسجد دعا نى فقال امكثى فى بيتك حتى يبلغ الكتاب اجله قالت فاعتدت فى اربعة شهر وعشر ....



ان الله تبارك وتعالى لما اراد ان يمتحن عباده [illegible] ان يبتليهم فرق
طرق العلم فجعل منها ظاهرا جليا وباطنا خفيا ليرفع الذين اوتوا
العلم كما قال عز وجل يرفع الله الذين امنوا منكم والذين اوتوا ا
لعلم درجات والدليل على ان ذلك كذلك هو ان الدلائل لو كانت كلها
جلية ظاهرة لم يقع التنازع وارتفع الخلاف ولم يحتج الى تدبر ولا
اعتبار ولا تفكر ولبطل الابتلاء ولم يحصل الامتحان ولا كان للشبهة
مدخل ولا وقع شك ولا حسبان ولا ظن ولا وجد جهول لان العلم
كان يكون طبعا وهذا فاسد فبطل ان تكون العلوم كلها جلية
ولو كانت كلها خفية لم يتوصل الى معرفة شيء منها اذ الخفي لا يعلم
بنفسه لانه لو علم بنفسه لكان جليا وهذا فاسد ايضا فبطل ان
تكون كلها خفية وقد قال الله عز وجل هو الذي انزل عليك الكتاب
منه ايات محكمات هن ام الكتاب واخر متشابهات الى قوله وما يذكر
الا اولوا الالباب وقال عز وجل ولو ردوه الى الرسول والى اولي الامر منهم
لعلمه الذين يستنبطونه منهم [illegible] العلم [illegible]
وبطل ان يكون كله خفيا ثبت ان منه جليا ومنه خفيا وبالله التوفيق
باب الكلام [illegible] وجوه [illegible]
[illegible] هو مذهب [illegible]

Cairo MS, uṣūl al-Fiqh, 170 (5768).

SECTION. 5 : MURSAL KHABAR.

As for Mursal, it is "a statement the 'Isnad' of which are cut asunder and disturbed by mentioning only /some narrators".

There is no disagreement on the point that is not obligatory to act according to the (mursal) (disconnected report) when its narrator mursil is not cautious. In case its narrator is cautious and drops none (from 'Isnad) except (C/7b) reliable narrators like Ibrāhīm al-Nakha'ī and Ibn al-Musayyib, it is obligatory to act according to it, as is held by Imām Mālik and Abū Ḥanīfah. Imām Shāfi'ī on the contrary holds that except in the case of Ibn al-Musayyib especially, it is not obligatory to act according to the disconnected (mursal) ḥadīth, as I examined the 'marāsil' of Ibn al-Musayyib and found them correct in 'isnād'.

(1) The proof of our view is the agreement of the (people) of the first century on the acceptance of a mursal (disconnected) ḥadīth. Had it not been so, the ḥadīth would have been declared null and void and the irsāl would have been considered harmful in all its cases. This has reached us from Abū Hurayrah, Ibn al'Abbās, Al-Barra' ibn 'Āzib, Ibn 'Umar ibn al-Khaṭṭāb and other Ṣaḥābah, and most of the tābi'īn (those who came after them) and their successors.

Muhammad ibn Jarir al-Tabari (57) says that to refuse mursal ahadith is an innovation which prevailed after two centuries of the Hijrah.

There is again no difference between the mursal of Sa'id Ibn al-Musayyib and that of other when the mursal is ~~by common consent~~ cautious and, a reliable one. For if Imam Shafi'i accepted the mursal of Sa'id, he did so because its isnad were found continuous (muttasil); he therefore, did not accept the mursal, (of Sa'id without isnad), rather he accepted the musnad (connected hadith). It carries, therefore, no meaning to say that he accepted the mursal of Sa'id because he found their full sanad. The same is the decision of others.

(ii) Another proof that attests acting according to the mursal (disconnected hadith) is our agreement on the fact that Ta'dil (to declare a narrator trustworthy) is established by the announcement among the people of knowledge written [illegible] = (the particular person is trustworthy), without explaining the meaning of 'adalah'.

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(57) Muhammad Ibn Jarir al-Tabari; Muhammad ibn Jarir ibn Yazid al-Tabari (224/839-310/923) was a famouse, historian, muhaddith and jurist. His books, Ikhtilaf al-Fuqaha' and Adab al-Qadi are the valuable works on jurisprudence. He died in Baghdad in Shawwal 310 A.H/923 A.H. (Kahhalah, Mu'jamal-Muwwalifin, Damoscus, 1379/1960, Vol, IX, p. 147).

So, when it is known that a particular rawi (narrator) drops (uses irsal) only a reliable rawi by way of habit or by his own information, his droping (this rawi) is equivalant to his saying, حدثني فلان وهو ثقة "such and such person has narrated to me this hadith and he is trustworthy," (M/8b).

We (jurists) are unanimous on the point that if a particular rawi declares this, it is obligatory to follow him in his "ta'dil". Similar is the case when he (rawi) uses irsal (i.e. his mursal will obligatorily be followed).

SECTION. 6 : THE STATEMENT (AL-KHABAR) WHOSE NARRATOR DOES NOT ACT UPON IT.

When a narrator (rawi) narrates a statement (khabar) but does not act upto it, his forsaking the same will not nullify the obligation of acting upto it. This (view) is held by most of our authorities but some of our authorities and the followers of Imam Abu Hanifah. hold that it ~~is apparently absurd to~~ nullifies the obligation of acting according to such statement.

The proof of what we say is the fact that when the khabar (narration) of the Holy Prophet, (may peace be upon him) is reported it is binding upon his companions to follow it except when there is a proof which (C/8a)

indicates that the khabar (statement) is abrogated. When such narration is left out by somebody it would not nullify the obligation of action for those who receive it. That is why we argue with the khabar of Ibn 'Abbās in the case of Barīrah, who was bought and then set free. She was under a slave (by marriage) and was given choice (after she was set free), whereas, Ibn 'Abbās considered the purchase of a slave girl amounting to her divorce as well.(58)

SECTION. 7 : THE STATEMENT (KHABAR) WHOSE NARRATOR REPUDIATES IT.

When a rāwī narrates a khabar and the man from whom is has been narrated (al-marwī 'anhu) repudiates it, the khabar has two aspects. Either the person on whose authority the narration has been related will stop (to do anything according to it) and doubt (it) ; or he will assert that he did not narrate it. In the former case, all our authorities as well as the Hanifite and Shafiite consider it obligatory to act according to such khabar.

Al-Karkhī, however, holds that it is not obligatory to act according to it.

The proof of what we say is the fact that his forgetting the khabar is no more than his death. Now, we

(58) Mishkāt al-Maṣābīḥ, Delhi, 1932, p. 276;

ان الامة اذا اعتقت تحت عبد فخيرت بخبر بريرة انها اعتقت تحت عبد فخيرت
وان كان مذهب ابن عباس ان بيع الامة طلاقها .

all agree that the death of the narrator does not repudiate the necessary function of the Khabar. Hence the same is the effect of forgetfulness.

In the latter case, the narrator either means, that the khabar is related to him but that he did not narrated it — a case which does not repudiate the obligation of acting according to it in so far as th marwī ʿanhu (the authority from whom it has been narrated) is concerned. Or he means that he did not narrate it to anyone a case which cannot at all be argued with. For in case the narrator (i.e. al-marwī ʿanhu) is a liar, his khabar is absurd per se, and in case he is truthful, the khabar again is absurd, as according to him he has not narrated it.

SECTION. 8 : ADDED STATEMENT (KHABAR) OF AN UPRIGHT AND STEADY NARRATOR.

The narration (riwāyat) of a statement (khaba including something in addition (to what has been narrated by others) recorded by a narrator who is upright, steady and well known for memory and perfectio is to be accepted and acted upon, contrary to some Muḥaddithūn who hold that it is not to be accepted in general. Some jurists, however, are of the opinion that the additional words will be accepted from the just and upright one.

The reason of our viewpoint is that if two persons bear witness to the fact that the man is indebted of one thousand while two other witnesses bear witness that he is indebted of one thousand five hundred the additional sum will be considered. Similar is the case with the statement (al-Khabar). So if the narrator narrated actual khabar only his khabar (statement) is to be accepted. Such being the case, when he has narrated a khabar with some addition, it is also to be accepted.

SECTION. 9 : STATEMENT (KHABAR) REPORTED BY WAY OF PERMISSION.

To act upon the statement transmitted on the basis of permission, is obligatory. This has been held by the majority of the jurists.

The Zāhirites hold that to act upon "the permitted statement" is not lawful except when the narrator has obtained the hadith or the permission has been given in writing to its narrator that "such and such book or register containing (C/8b) such number of narrations belong to me and that, I am hereby giving the permission of their narration."

The proof of (M/9a) what we say is the fact that whoever writes to someone that "I have narrated the register of al-Muwwaṭṭa, from so and so(and he names the person) and now you narrate it from me, when you

find it correct", he needs to assert that the book is with him through the transmission of a reliable authority then he needs to know the book corectly and assert it as well that it is similar to the original one narrated to him by the reliable one. He thus obtains the narration (riwāyat) after asserting that it is with him through two ways. But when the narrator says to him (i.e. to his student) orally, "Whatever transmission (ḥadīth) narrated by me is sound in your view, you narrate it from me". In this case, one only needs a reliable statement that the book has been narrated (for the student) by the speaker from a particular person. It is therefore proved to be sound with him through one way only.

Now, it is established and confirmed in the first kind that it is sound to give him permission, — a fact necessary for making the narration more genuine.

Here ends the first part which is followed by the second with the Blessings of Allāh and His Assistance. Exalted is He.(59)

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(59) This paragraph is only withen in the manuscript of Mederid and does not find in Cairo script. The author in the begening has devided the Sharī'ah law into three kinds or sources; — (i) Asl, (ii) Maqūl al-Aṣl and (iii) Istishab al-Ḥāl. The first kind or part i.e. Asl does not ends here therefore it seems the mistake of the kātib.

C H A P T E R - II

O N T H E D I S C U S S I O N O F T H E A B R O G A T O R (A L - N Ā S I K H) A N D T H E A B R O G A T E D (A L - M A N S Ū K H)

SECTION, 1 : MEANING OF THE ABROGATION (AL-NASKH).

The abrogation (al-Naskh) means "cancellation of a decision of the previous Sharī'ah Law caused by another Sharī'ah Law that came afterwords in a manner that if there was no Sharī'ah Law subsequently the first one (decision) would have remained confirmed".

In other words both the abrogator (al-Nāsikh and the abrogated (al-Mansukh must be the Shar' (religious decisions). As for that original decision which remains in effect and ~~(secondly)~~ that decision which is repealed after its confirmation and enforcement, are not called abrogation,

SECTION. 2 : ABROGATION (NASKH) WITH A STIPULATION.

This having been established; whenever a part of sentence is dropped or any of its stipulations is dropped,

the majority of the jurists hold that this is no abrogation (Naskh). On the contrary some people hold that it is abrogation. Similar is the case with addition in the naṣṣ (the text). The Hanafites hold that it is abrogation while our authorities and the Shafi'ites say that it is no abrogation.

Qāḍī Abū Bakr says that if the "addition" or " delition" in a certain form of worship (Ibādah) is in a manner that what is not an established form of worship perse is made an established form of worship, an independent offering, or what is a Shar'ī (religious) mood of worship is made an irreligious form of worship, then all this is abrogation, For example, a particular prayer of two rak'āts is increased by two more rak'āts , this is abrogation, since the first two rak'āts are now not (C/9a) a religious prayer. Similarly then an order is given that four rak'āt ṣalāt is to be offered in two rak'āts ohly, it is also abgogation, as now the four rak'āt-ṣalāt is no ṣalāt.

When the "addition" and "deletion" do not change the decision about the increased and the decreased one, it is no abrogation. For example if forty floggings are ordered as ḥadd for drinking wine and then eighty floggings are ordered in the same case, the increase does not nullify the decreased decision. Therefore if forty floggings are awarded after an order of eighty was issued,

forty would suffice treating the order of eighty as its basis, which shall be completed if it is intended.

Whereas he who has been ordered to say four rak'āts-prayer, offers only two rak'āts, his prayer will not suffice unless he performs two (more) rak'āts, starting it with the intention of four rak'āts.

Likewise if eighty floggings were ordered as the ḥadd of wine and then it was decreased, this order would not abrogate the whole ḥadd; it would only abrogate forty floggings.

SECTION. 3 : EFFECT OF ABROGATION IN THE STATEMENTS (AL-AKHBAR).

The majority of the jurists are of the opinion that abrogation (naskh) does not affect statements (akhbār). But a group (of jurists) says that abrogation does affect the statements. The fact is that a statement (al-khabār) itself is not abrogated surely not a case of abrogation but of falsehood. But if a decision is asserted through a statement, feasibility of "abrogation" may be caused.

SECTION. 4 : ABROGATION OF A MODE OF WORSHIP BY A SIMILAR WORSHIP.

A mode of worship can be abrogated by a similar mode of worship, no matter whether the latter is similar, lighter or heavier. This is held by the majority of jurists.

A section of people (among the jurists) forbids the abrogation of a mode of worship by a heavier one. Our view is supported by the fact that the Creator, the Exalted, has made that which is easy to perform as obligatory for mukallaf (legally responsible), and has declared all that is difficult for them unlawful. Thus when it is ~~possible~~ necessary to begin with a mode of obedience which is heavier than the original decision then it will be lawful to abrogate their mode of worship ~~by what~~ with which is ~~to them~~ not lighter.

SECTION. 5 : RECITATION OF A VERSE (AL-TILĀWAT) AND A BROGATION (NASKH).

When a recited verse (al-tilāwat) contains a decision urging prohibition (ṭahrīm), obligation (farḍ) or some other forms of worship and bids us to recite the same, such a verse possesses two decisions;

(1) The mode of worship contained therein, and

(2) The preservation and recitation of the vers necessitated thereby.

This is like a statement (khabar) (C/9b) that contains two decisions.

(i) Fasting (ṣawm) and (ii) Prayer (ṣalāt).

When this is established it is lawful either to abrogate the decision and retain the recitation (of the verse) or to abrogate the recitation (of the verse) and retain the decision.

As for the abrogation of the decision with the continuity of the recitation (of the verse), it is like the decistion of abrogating choice between fasting and offering *Fidyah* (compensation) for those who can fast; and the abrogation of a will (wasiyyat) for parents and near relations, and the abrogation of offering alms ([illegible]) before conversing with the Prophet, although the recitation of all the verses is retained.

As for the contimuity of decision (hukm) and the abrogation of the recitation (tilāwat) of the verse, it is exampled in the case in which the statement (al-Akhbār) prevail that the recitation of verse bidding to stone the married-fornicators to death (Āyat al-Rajm), is abrogated while its decision is retained.

SECTION. 6 : ABROGATION OF A MODE OF WORSHIP ('IBĀDAH) BEFORE ITS ENACTMENT.

Abrogation of a mode of worship is valid before the time of action. This is a view which is agreed upon by the majority of the jurists. Abū Bakr al-Ṣayrafi (60) and some Ḥanifites, on the contrary, hold that abrogation of a mode of worship before action is not valid.

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(60) Abū Muḥammad ibn 'Abd Allāh al-Ṣayrfī (d.330/941) was a famour Shāfite of Baghdād and the author of many juristic works like, *K. al-Shurūt*, *K.al-Ijmā'*, *Sharh Risalah al-Shafi'ī*, *Dalā'il al-Alām 'alā Uṣūl al-Aḥkām fī Uṣūl al-Fiqh* etc. (Ibn Khalikān, *Wafayāt al-A'yān*, Cairo,1367/1948, Vol,II, p. 337; Kaḥḥālah, *Muj'am al-Muwwalifīn*, Damoscus, 1380/1940, Vol, X, p. 220.)

The proof of what we say is Allāh's commandment to Ib'rāhim to sacrifice his son; then, the commandment was abrogated before its performance. We have already mentioned that abrogation is withdrawl of a decision that was previously asserted by the Sharī'ah.

When the time of the worship is over, it is not free (M/10a) from two possibilities —— it was done or not done. If it was done it needed no abrogation, because the action that was ordered was already performed. If it was not done, it is also not to be abrogated, because nobody is aksed not to do a certain action (on a day that passed away). Further an action in the past does not fall under the legal responsibility (al-taklīf). Hence abrogation is only genuine before the time of worship is over.

As for abondoning an obligatory mode like that of 'Ībadat in future, it is no abrogation, since the time that passed belongs to the 'Ībādat. This action in fact is only to render the like of the 'Ībadat absurd.

SECTION. 7 : ABROGATION OF A QUR'ĀNIC VERSE BY ANOTHER VERSE OF A STATEMENT (KHABAR) BY ANOTHER STATEMENT.

There is no difference of opinion among the scholars in the validity of abrogating a Qur'ānic verse by another Qur'ānic verse, Khabar mutawatir (a continuous

hadith) by another Khabar mutawatar, and Khabar Wahid (hadith narrated by one rawi) by another Khabar Wahid.

The majority of jurists are of opinion that to abrogated a qur'anic verse by Khabar mutawatar is lawful, but Imam Shafi'i denies it. They (the jurists) argue that both the qur'an and Khabar Muawatir (i.e. a transmission narrated by a large number of transmitters whose agreement on falsehood cannot be conceived of) are religious decision, the genuine of which is sure and certain; and when it is lawful to abrogate a qur'anic verse by another qur'anic verse, it is also lawful to abrogated the qur'anic verse by a Khabar Mutawatir. What explain this argument is the expression of Allah الوصية للوالدين والاقربين "that he bequeaths unto parents and near relatives," (61) which is abrogated by a statement narrated from (C/10a) the prophet who said, (Allah, the Exalted, has given everybody his due right. So the will is not (restricted) for an heir (only)". (62)

SECTION. 8 : ABROGATION OF THE SUNNAH WITH THE QUR'ANIC VERSE:

To the majority of jurists it is lawful to abrogated the sunnah with the qur'anic berse but it has been denied by Al-Shafi'i.

(61) Al-qur'an, 2 : 180
(62) Abu Dawud, al-Sunan, Kanpur, 1346 A.H,(Kitab al-wasaya), Vo, II, P.40;

ان الله تعالى قد اعطى كل ذي حق حقه فلا وصية لوارث -

They (the jurists) argue with the case of 'Salat al-Khawf' (to perform prayer at the time of fear) that has occurred in the Qur'an after the sunnah asserted ~~establishment~~ on the day of Ditch to postpone its performance until the fear is removed. ~~of this (Salat) by sunnah~~.

Similarly, facing to' Bayt al-Maqdis' was abrogated by Allah's expression, فول وجهك شطر المسجد الحرام "turn the face towards to the Inviolable place of worship."(63) And Allah's expression, لا ترجعوهن الى الكفار, (64) "Send them not back unto the disbelievers", abrogated the decisions of the prophet for returning those Muslims who came to him (from Mecca) to disbelievers.

SECTION. 9 : ABROGATER OF QUR'ANIC VERSE AND KHABAR MUTAWATAR BY KHABAR AL-WAHID.

Abrogation of the Qur'anic verse and Khabar Mutawatir is lawful. But a group of jurists rejects it.

The argument is apparently the the fact that the people of the Quba turned to the direction of the Ka'bah on the information of one man who came from Madinah. They obviously knew that it was in accordance with the faith of the prophet to turn to the Bayt al-Maqdis . But it ~~was~~ is not lawful to abrogate ~~turn to the~~

(63) Al-Qur'an, 2 : 150.

(64) Ibid, 60 : 9.

~~Bayt al-Maqdis~~ a Quranic verse on the strength of a Khabar Wahid after the time of the Messenger ~~came~~.
This has been agreed upon by the consensus of the opinion.

So far as "reasoning" is concerned it is clearly not lawful to abrogate anything by "reasoning" or al-Qiyās.

SECTION. 10 : THE PRECEDING SHARĪ'AH.

A group of our authorities, the Hanafites and the Shāfi'ites, hold that the Sharī'ah of our predesessors is binding upon us except that which is abrogated by the 'Sharī'ah.

Qāḍī Abū Bakr and a group of our authorities, however, reject it.

The proof of what we say is the expression of Allāh;

اولئك الذى هدى الله فبهدا هم اقتده

"Those are they whom Allāh guideth, so follow their guidence."(65) This expression bids us to follow them and thereby follow Allāh.

Similarly Allāh's expressions ; (i)

شرع لكم من الدين ما وصى به نوحا و الذى اوحينا اليك .

"He hath ordained for you that religion which He commanded unto Noah and that which we inspired thee (Moḥammad)."(66)

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(65) Al-Qur'ān, 6 ; 91.

(66) Ibid, 42 ; 13.

(ii) and ولا تتفرقوا فيه "And be not divided therein".[67] And also what is narrated from the Holy Prophet (may peace be upon Him) ;

"Whoever sleeps without saying the prayer or forgets to perform it he should say his prayer on (M/10b) remembering it",[68] indicate that the previous injunctions are binding on us, for Allāh , the Exalted, says اقم الصلوة لذكرى "Establish worship for My rememberance"[69] — a saying with which Moses was addressed and which was adopted by our prophet."

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(67) Ibid. 42 : 13.

(68) Abū Dāwud, al-Sunan, Kanpur, 1346 A.H. (Kitāb al-Ṣalāt), p. 62.

(69) Al-Qur'ān, 20 : 14.

C. AL - 'IJMĀ' OR CONSENSUS OF THE COMMUNITY

SECTION. 1 : IMPLICATIONS OF CONSENSUS OF THE COMMUNITY ('IJMĀ').

The agreement of the community on the decision of a certain case is the evidence of the Sharī'ah. It is therefore obligatory to act according to what has been agreed upon and to be sure of its soundness, as opposed by the Imāmites.

The proof of this is the expression of Allāh, "And whoso apposeth (C/10b) the Messenger after the guidance (af Allāh) hath been manifested unto him"(70), and "We appoint for him that unto which he himself hath turned, and expose his unto hell - a hopeless journey"(71). Allāh has therefore given a warning for following a path other than that of the believers. Hence it bides to follow their path.

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(70) Al-Qur'ān, 4 : 114;

ومن يشاقق الرسول من بعد ما تبين له الهدى ويتبع غير سبيل المومنين

(71) _Ibid_, 4 : 115;

نوله ما تولى ونصله جهنم وساءت مصيرا -

SECTION. 2 : MEANING OF THE CONSENSUS OF THE COMMUNITY.

This having been established, the '<u>Ummah</u> (Muslim Community) consists of two groups;

(i) AL-KHASSAH or the chosen and,

(ii) AL-'AMMAH or the common.

Thus it is obligatory to consider the view of 'the chosen' and "the common" on the matter in which they have been respectively made legally responsible.

As for the decisions which are only known to the jurists and the administrators such as those relating to (<u>talaq</u> , divorce , <u>nikah</u> , marriage, <u>buyu</u>', sales, '<u>itq</u> , emancipation or making a slave free, <u>tadbir</u>, to promise a slave that he will be free on the death of the master, <u>Kitabah</u> = under-taking, to give a written undertaking to a slave that he will be free on paying a certain amount mentioned therein, <u>jinayat</u>, crimes, <u>Rahn</u> , mortgage etc; there will be no consideration for a disagreement of the common people, "in such matters as they (the common) are hardly aquainted with them.

This (view) is held by the majority of the jurists. Qadi Abu Bakr, however, says that in all matters the views of the common man willl be considered.

The proof of what we say is the fact that it is incumbent on the common man to follow the agreed decision of the learned; it is not lawful for them to oppose the

learned. The ~~learned being~~ contemporaries ~~of the common man and having the knowledge of~~ those who preceded them, ~~are, the intellectuals and scholars of the time (to be depended upon)~~.

It is, therefore, most apt and reasonable not to consider the views of 'the common man' (al-'Āmmah) as against the agreed opinion of the learned.

SECTION. 3 : METHOD OF IMPLEMENTATION OF CONSENSUS OF THE COMMUNITY.

The consensus of opinion is not enforced until all 'Ulama (learned people of the 'Ummah) agree to it. So, even of a single 'Ālim deviates from the consensus of opinion, it will not be enforced.

Ibn khuwayz Mandād however says that one or two persons will not be taken into consideration.

The proof of what we say is the expression of Allāh. "And in whatsoever ye differ, the verdict therein belongeth to Allāh". (72) و ما اختلفتم فيه من شئ فحكمه الى الله

Of course, there exists enough difference of opinion among the jurists on this issue.

SECTION. 4 : CONSENSUS ('IJMĀ') WITH THE LAPSE OF TIME.

Whenever the juirsts agree on the decision of a case the consensus of opinion is established and its opposition is unlawful without consideration of lapse of

(72) Ibid, 42 : 10.

time. This is held by majority of jurists from amongst our authorities and others. Abū Tamām from among our authorities and some Shāfi'ites, however, hold this view that the consensus of opinion is established only with the lapse of time.

It is argued that the proof of the consensus of opinion is confirmed either by (i) Agreement ('Ijmā') (ii) Lapse (C/lla) of time (inqrāḍ al-'aṣr), or (iii) Both. It is unlawful to confirm it by "lapse of time" since (M/lla) it is neither a statement (Qawl) nor an evidence (ḥujjat), (and because 'Ijma' would thus necessarily become open to difference of opinion with lapse of time. Both "lapse of time "and "agreement" cannot form a proof, as neither of the two can separately be a proof. They will be (considered) a proof when one is related to the other. There remains, therefore, the only possibility that (consensus of the community) is a proof (evidence) which exists with the continuity of time.

SECTION. 5 : VALIDITY OF THE CONSENSUS (AL-'IJMĀ') OF EVERY AGE.

The agreement (consensus) of the people of every period is a binding proof or ḥujjat (of the Sharī'ah).

This view is held by the majority of jurists except Dāwūd ibn 'Alī al-Aṣbahānī, who holds that the the (consensus or 'Ijmā' of the age of the companions

(of the Prophet) is an authority but not the consensus of the believers in all ages.

Our arguement is the expression of Allāh the Almighty, "And whoso oppseth the messenger after the guidence (of Allāh) hath been manifested unto him.(73)

When it is established that the companions (Ṣaḥābah) have been associated with non-companions (Ghayr Ṣaḥābah) in the matter of name the decision of the former will necessarily be established for the latter as well except when it is indicated that the Ṣaḥābas are exclusively meant.

SECTION. 6 : THE CONSENSUS OF THE MEDENITES ('IJMĀ' AHL AL-MADINAH).

Our authorities (Malikites) have generally used the word 'Ijmā' Ahl -al-Madinah i.e. consensus of the people of Madinah. Imām Mālik and his learned companions (student) have exclusively relied on arguing with it, ('Ijma' Ahl- al-Madinah) in all the matters relating to transmission.

For instance, the case of the adhān, the Ṣā' the recitation of, بسم الله الرحمن الرحيم in prayers in low tune (in the Fard Prayers) and similar other matters which are only proved by way of transmission and its continuity (Tawatur).

(73) Al-Qur'ān, 4 : 114 ;

ومن يشاقق الرسول من بعد ما تبين له الهدى ......

and thus continuity is found as a characterstic among the Medinites, because Madina is the place of Prophethood, the seat of Caliphate and the Sahabah after the Prophet (blessings of Allah be upon him and upon them). If the other towns too shared this merit the same rule would apply to them.

SECTION. 7 : PROPER OR IMPORPER CONSENSUS (AL-IJMA).

When a Companion (of the Prophet) or an Imam gives a statement (qawl) or a decision (hukm) which prevails and spreads so much so that nothing like that can be concealed, nor was there known any opponent or denier, then it is " Consensus" (Ijma') and a binding proof (hujjat al-Qati'ah).

This is held by the majority of our authorities, and Hanafites and the Shafi'tes. But Qadi Abu Bakr says (c/11b) that consensus of opinion is only valid when the statement of every one of the Sahabah is transmitted. This view is (also) held by Dawud.

The proof of what we say is a custom commonly accepted by the people (Adat al-Jariyah) establishes the fact that a great multitude and a major part of people cannot co-operate and mutually agree on a view which they believe as wrong and absurd, nor can they refrain from condemning it and expressing their opposition. Most of them on the contrary, hasten to condemn it and vie with eac other (in

doing so). Thus when a view prevails and spreads to the remote corners of the earth without having an opponent, it is convincing that the people's silence amounts their consent and approval of the same, which has been their continious habit. If it were not so and the consensus (ijmā) were to be establishes as the binding proof with the agreement of each scholar of the age then a certain decision (on an issue) would never be taken by the consensus. Because it is very difficult to establish consensus (of the community) on any issue either relating (M/11b) to the Root (al-Aṣl) or to the general law (al-far') through such method. For instance, on a certain decision in a case that confornts us, we do not know the consensus of the jurists of our own age, since they are dispersed in every corner of the world and we do not know most of them

SECTION. 8 : DISAGREEMENT OF THE COMPANIONS (ṢAḤĀBAH) ON TWO OPINIONS.

When the companions of the Holy Prophet (Ṣaḥābah) disagree, holding different views on a case, the third view will not be valid. This is the view of all our authority and the Shāfi'ites. But Abū Dāwūd holds that the third view will be valid.

The proof of what we say is that they have agreed only on two different opinions, and are thus united on the point that any view other than the two, is wrong. They have only disagreed in determining the truth in either of the two but have not disagreed in holding anything beside the two, as wrong. Hence, whoever speaks of anything other than the two views, asserts that what is unanimously held by the Ṣaḥābah as wrong.

SECTION. 9 : CONSENSUS IN RESPECT OF REASONING (QIYĀS).

According to the majority of the juirsts the consensus of opinion on a decision arrived at by analogical reasoning (Qiyās) is valid.

On the contrary Ibn Jarīr al-Ṭabarī holds it that it is not sound in its existence. In case it exists, it will serve as an evidence (of the Sharī'ah).

Dāwūd also says that this is not correct. His view is based on the fact that analogical reasoning is not the evidence (of the Sharī'ah). The rational discourse on this (point) (C/12a) will follows.

PART - II

MA'QŪL AL-AṢL OR THE INTELLIGIBLE MEANING OF THE ROOT

CHAPTER - I

KINDS OF EXPRESSION

We have (in the beginning) mentioned that the sources of the S͟harī'ah are of three types:-

(1) Aṣl, Root.

(2) Ma'qūl al-Aṣl, the intelligible meaning of the Root.

(3) Istiṣḥāb al-Ḥāl, association with the prevailing conditions.

The discourse on al-Aṣl or Root has already been given. The discussion here is on Ma'qul al-Aṣl or 'The Intelligible Meaning of the Root' which is devided into four kinds;

(1) Laḥn al-K͟hiṭāb or tone of expression.

(2) Faḥw al-K͟hiṭāb or purport of expression.

(3) Al-Ḥaṣr or restriction.

(4) Ma'nā al-K͟hiṭāb or meaning of expression.

SECTION. I: TONE OF EXPRESSION (LAḤN AL-KHITĀB).

Laḥn al-Khitāb is "that part of the expression (ḍamīr) without which the discourse (kalām) is not complete".

The term is derived from the word "Laḥn" (tone) the meaning of which becomes apparent as soon as the discourse is spoken.

For instance, Allāh, the exalted says; "And whosoever of you is ill or on a journy, (let him fast the same) number of other days", (74) meaning thereby that if ~~you~~ he breaks ~~your~~ fast, ~~and~~ he should fast the same number of other days (in a month after the Ramaḍān). This verse is a clear evidence and to act upto it is obligatory (Wājib).

For example, we argue that bone is the palm (piller) of life, as Allāh says; "who will revive these bones when they get rotten" (75). The Hanifite says that the verse means, "who will revive the people of the bone" ? In such a case it is not permissible to assume a hidden meaning without any indication, as the expression is complete without it.

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(74) Al-Qur'ān, 2 ; 184: و من كان منكم مريضا او على سفر فعدة من ايام اخر

(75) Ibid, 36 ; 70 ;

من يحي العظام و هي رميم

SECTION. 2 : PURPORT OF EXPRESSION (FAHWA AL-KHITAB).

As for the second kind i.e. Fahw al-Khitab it is that expression, "which is understood from the expression itself as to what is intended by the speaker in accordance with the usual meaning of the word".

For instance, Allah's expression; "Say not 'fie' unto them, nor repuls them but speak unto them a gracious word."[76]

Thus beating and abusing etc. is prohibited (in this verse) as understood from its linguistic meaning. It is also understood (from the verse) that it is necessary to keep this in view and act according to it.

SECTION. 3 : RESTRICTION (AL-HASR).

As for (M/12a) the third kind i.e. al-Hasr it has only one word '<u>innama</u>' i.e. only, merely, indeed etc.

(i) For instance, the expression of the Holy Prophet, (may peace be upon him) انما الولاء لمن اعتق "Wala' (relationship of client) belongs only to him who emancipates."[77]

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(76) <u>Ibid</u>. 17 : 23; ولا تقل لهما اف ولا تنهرهما .....

(77) This <u>hadith</u> has been narrated by 'Aishah who who intended to purchase a slave girl for manumission. Al-Muslim records the transmission in these words;
انها (اى عائشه) ارادت ان تشترى جارية تعتقها - فقال اهلها نبيعكها على ان ولاءها لنا فذكرت ذلك لرسول الله صلى الله عليه وسلم فقال لا يمنعك ذلك فانما الولاء لمن اعتق
(Muslim, al-Sahih, Cairo, 1374/1955, Vol. II, p. 1141).

This word evidently indicates that he who does not emancipate has no right of walā'.

(ii) Sometimes this expression is used for the assertion of the object of the text and not for the negation of anything else, such as, انما الكريم يوسف "the noble is indeed Yūsuf" (Allāh's blessing be upon him) and انما شجاع عنترة "the brave is indeed 'Antarah;" "In the first expression, it does not intend (C/11b) to negate' nobility' from other than 'Yūsuf and in the second bravery from other then 'Antarah. It only aims at the assertion of 'nobility' for Yūsuf and makes him superior to others.

But the first meaning (item (i) above) with which we began (the discourse) is evident and will not be superseded without any indication.

SECTION. 4 : INDICATION OF EXPRESSION (DALĪL AL-KHIṬĀB).

According to many authorities, Dalīl al-Khiṭāb also relates to the discourse of ma'qūl al-Aṣl. Dalīl al-Khiṭāb means , "Such expression conveying a decision the meaning of which depends on a certain genus (object)". This meaning, to them (those who hold it) demands the negation of the decision (from all that is devoid of it), the meaning being in the genus (object).

For example the saying of the Holy Prophet, "in the grazing sheep there is Zakat."[78] This indicates that there is no Zakat on other then the grazing ones. This kind of inference is called by the people of jurisprudence Dalil al-Khitab or the indication of expressio

A group of our authorities and Shafi'ites have held this view (discussed above), while another group of our authorities, Sha'fi'ites and Hanafites have denounced it, and this is correct. Because the connection of the decision with a description in a genus, indicates the dependence of the decisions on that which possesses the description in particular. As for the rest of the genus, its decision remains unknown. An indication (dalil) of its decision will be sought out in the Shari'a

This (view) is indicated by what has been narrated by Imam al-Bukhari from al-Shaybani from 'Abd Allah ibn Abi 'Awfa ; The Prophet (peace be upon him) prohibited (us) from the green jar ; ('Abd Allah says) I enquired, "Is (it lawful) to drink in the white one?", the prophet said "No".[79]

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(78) 'Ali al-Muttaqi, Kanz al-'Ummal, Hyderabad (Deccan), 1374/1954, Vol, V, p. 518, Hadith No, 2791.

(79) Ibid, Vol, V, p. 301; hadith No. 27

عن سليمان الشيباني عن عبدالله ابن ابی اوفی قال سمعت رسول الله صلى الله
عليه وسلم ينهى عن الجر الا خضر يحلى النبيذ في الجر قال والابيض قال
لا اری لا ادری -

The argument here proceeds on the fact that the hadith is a text (nass) on the green jar, but ~~he~~ the narrator also mentions that the utility of the white one is same as that of the green, while the ~~Prophet~~ narrator was an authority on the diction. Now, were it lawful to consider, the comment of a ~~"the indication~~ (dalil) al-Khitab's (the indication of the expression), it would be necessarily ~~to~~ give a contrary decision concerning the white one and the decision would not ~~have been conjoined with~~ concern the green jar in particular~~ly~~.

C H A P T E R - II

L A W S O F A N A L O G Y (Q I Y A S).

SECTION. 1 : MEANING OF ANALOGY (MA'NA-AL-QIYAS).

The fourth kind of Ma'qul al-Asl is Ma'na al-Khitab are the intention of the expression, which in other words is 'Analogy (Qiyas) itself that is, "application of either of the two known objects to the other to affirm or avert a certain decision on the basis of something common to both". And this (Qiyas) is unanimously held as a source of the Shari'ah. Dawud however, holds that recourse to Analogy (Qiyas) is allowed from the viewpoint of 'intellect' or 'aql but the Shari'ah has prohibited it.

The proof of what has been unanimously held by a group of the leanned (C/13a) is the expression of Allāh, فاعتبروا يا اولي الابصار "go, learn a lession, O' ye, who have eyes."(80) The word 'i'tibār' linguistically means "to liken one thing (M/12b) to another and to apply its decision to the other". It is therefore said, عبرت الدنانير والدراهم meaning thereby "I have verified their measures and weights". An Interpreter of a dream is therefore called a Mu'abbir. Thus it is said, عبرت الرؤيا "I interpreted the dream with a suitable and congenial decision", وتحتها بما يشابهها "I explained it (the dream) with that which resembled it" and عبرت عن كلام فلان "I explained the expression of the particular person" meaning thereby "I used words which agreed with his intention and resembled his expression".

SECTION: 2. ANALOGY (QIYĀS) AS AN EVIDENCE OF THE SHARĪ'AH.

THE QUR'ĀN: The assertion of analogy is indicated by the expression of Allāh, مافرطنا في الكتاب من شئ "We have neglected nothing in the Book."(81) But we find that there are many problems which have not been mentioned either in the Qur'ān or in the sunnah of the Holy Prophet (may peace be upon him).

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(80) Al-Qur'ān, 59 : 2.

(81) Ibid, 6 : 38.

For instance a man possessing a dinār drops it in a lake belonging to some one and (finds himself) unable to get it back ; or a white piece of cloth belonging to a man perchance drops in the caserob of a dyer and is fully dyed and beautified, and so on. So, the Qur'ānic verse quoted above cannot be taken as a text (Naṣṣ) applicable to each and every event that takes place. It is only intended that the verse is a text (Naṣṣ) for a particular event and is applicable to all other cases having indications (in common) with this particular event. Thus a decision having been mentioned in the Qur'ān (in a particular event) attains the status of a Naṣṣ for all that which is similar in nature.

Therefore Analogy (Qiyās) is one of the evidences which determines a decision as referred to in the Qur'ān, since we find many a decision that can only be asserted by analogy and reasoning, examples of which have already been mention (in the preceding discussions).

AL-SUNNAH : As for its (analogy's) proof from the Sunnah (we may refer) to (the Ḥadīth in which) the Prophet said to 'Umar when the latter had enquired about the 'kiss' by a fasting man. "Do you see any harm if you rinse your mouth?" 'Umar replied, "No". The Prophet added, "Then what is the harm in it?".(82) Similarly, the Prophet

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(82) Dārimī, al-Sunan, Damoscus, 1349 A.H., (Kitāb al-Ṣawm) Vol, II, p. 12;

عن عمر ابن الخطاب قال هششت فقبلت وانا صائم فجئت رسول الله صلى الله عليه وسلم

فقلت صنعت اليوم امرا عظيما قبلت وانا صائم قال أرأيت لو مضمضت من الماء فقلت اذا لا يضر قال ففيم ؟

said to Khath'amiyy (a woman of the Khath'am tribe), "Do you think that you would have paid a debt which your father had on him"? She replied, "Yes". The Prophet rejohned ," It is then most rôghtful to pay Allāh's debt."(83) As a further example the Prophet said to him who had complained of the colour of his son, "Have you got camels?" The man replied, "Yes". The Prophet then asked him about their colours and the man replied that they were red. The Prophet thereupon enquired whether some of them were of ash colour and he agreed that some of (their young ones) were so. The Prophet then said to him, "What do you think? How did (the red camels) get their young one of ash colour?" He replied, "It is due to their origin to which they inclined". The Prophet then suggested that his (enquirer's) son had also inclined to his origin.(84) The examples are thus numerous.

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(83) Ibid, (Kitāb al-Manāsik), Vol, II, p. 41;

عن عبدالله ابن زبير قال جاء رجل من خثعم الى رسول الله صلى الله عليه وسلم فقال
ان ابى ادركه الاسلام وهو شيخ كبير لا يستطيع ركوب الرحل والحج مكتوب عليه فاحج
عنه قال انت اكبر ولده قال نعم قال ارايت لو كان على ابيك دين فقضيته عنه اكان
ذلك يجزى عنه قال نعم قال فاحج عنه -

(84) Ibn Mājah, al-Sunan, Lucknow, 1315 A.H; the words of this hadīth read as follows;

عن ابو هريرة قال جاء رجل من بنى فزاره الى رسول الله صلى الله عليه وسلم فقال
يا رسول الله ان امرتى ولدت غلاما اسود فقال رسول الله صلى الله عليه وسلم هل لك
من ابل فقال نعم قال فما الوانها قال حمر قال فهل فيها من اورق قال ان فيها
اورق قال فانى اتاها ذلك قال عسى عرق نزعه قال وهذا لعل عرق نزعه -

AL-RAYI WA AL-'AQL : The authenticity of analogy is also proved by the different opinions of (C/13b the Companions of the Holy Prophet on many issues, since w know that there were verbal discussions, arguments and counter arguments among them (on various topics). They, for example, differed concerning the inheritance of a grand-mother with brothers, 'awl i.e. reduction of share of heirs, zihar i.e. husband's oath regarding his wife, 'Iddah i.e. waiting period of a divorced woman, etc, etc.

These decisions (ahkam) on which the authority have differed are not free from one of the following state

(i) There occurs a clear text (Nass) for an issue, which needs no interpretation;

(ii) A text requiring interpretation; and

(iii) An issue on which no decision (hukm) has been taken (by Qur'an or al-Sunnah).

It is however, absurd (to conceive) that the decision is based on a nass (text), which needs no interpretation; since if there was such a nass the agreeable meaning would have at once been understood and there would have been no disagreement and a rightful Ijma' (Consensus of opinion) would have been established. It is also absurd to conceive of a nass as the basis of the decision, because the nass goes against all of them (i.e. the authorities), which is not valid, as it would necessitate their agreement on the absurd. If it is considered lawful then it would also be lawful that they may agree against

the Shari'ah laws like Prayers, Fastings and other modes of worship which have been explicitly ordered by the Law-Giver. But this is absurd by common consent of the Muslims. It is, again, absurd that in the case under consideration there is an indication whichn needs no interpretation, since it is necessary by constant habit that every opponent should incline to the explicit indication related (to the decision) withdrawing his own contention. He should also not argue his opinion with a reasoning, since an argument is purused only on the basis of a decision that is established to him without turning, at the time of discussion and assertion of truth, to what stands no proof to either of the two parties.

Since we find that everyone of them argues in this concern with his own opinion and reasoning without making any criticism or opposition, we come to know of their agreement on the genuineness of analogy (Qiyās)and reasoning (Ray') .

AL-IJMĀ' :- Another evidence of "Qiyās" is the agreement (Ijmā') of the Companions of the Holy Prophet on a number of decisions which they based on analogy and reasoning. For example;

(i) their agreement (Ijmā') on the leadership of Abū Bakr with their considered opinion and reasoning;

(ii) their agreement on the leadership of Uthmān, and a number of other matters on which they agreed.

(iii) A similar example is the story of 'Umar ibn al-Khattab (May God be pleased with him) that when travelled to Syria with the Companions of the Holy Prophet (May Allah peace be upon him) and arrived at Sargh, he was informed of the plague that had spread in the area. He consulted the Muhajirin al-Awwalin (the first emigrants) who differed in their opinions. Some of them asked him (C/14a) not to run away from the decree of Allah and, some other advised him not to proceed with the surviving Companions of the Holy Prophet to the (place of) epidemic. He then called the Ansar (the Helpers) who also differed as the Muhajirun had done earlier. Lastly he called those who were with him from among the elderly Quraishites, the emigrants of al-Fath (those who took part in the victory of Mecca), who, however, did not differ and suggested him to return (to al-Madinah).(85) Now none of them (on this occasion) mentioned any verse from the Holy Book or a Hadith from the Holy Prophet (may peace be upon him) in this concern. Everyone of them, on the contrary, gave his own opinion and the result of his own reasoning, while nobody disliked their deed 'Umar thereupon announced saying "I will start (my journey) next morning". The Companions, therefore, came to see him off on the following morning.

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(85) Muslim, al-Sahih (Kitab al-Salam), Cairo, 1375/1955, Vol. IV, P. 1740-1.

Abū 'Ubaydah ibn al-Jarrāḥ (the chief of the Army) spoke to 'Umar, "Are you fleeing away from the Decree of Allāh?" 'Umar said, "Did anyone other than yourself say this! O' Abū 'Ubaydah? Yes, we are fleeing from one Decree of Allāh to His another Decree. Don't you see that when a man possesses a herd of camels in his valley, one end of which is barren and the other end fertile and he leads his (M/13b) herd to the barren side or the fertile side, he does so by the Decree of Allāh"? Abū 'Ubaydah thus criticized him with his reasoning and 'Umar replied him with his own reasoning; neither of them argued in this case with the Qur'ān or Sunnah or sensus communis (Ijmā'). This story then spread far and wide and there was not a single Muslim who criticised them for using their reasoning I (al-Bājī), therefore, do not know any better case of Ijmā' than the one under discussion.

SECTION. 3 : ESTABLISHMENT OF LAWS THROUGH ANALOGY (QIYĀS)

When it has been established that Analogy (Qiyās) is an evidence of the Sharī'ah, it is lawful to establish al-Ḥudūd i.e. the limitations or Penal Laws', al-Kaffārāt i.e. the Atonements al-Mu'addarāt i.e. ~~valuations~~ Penal Laws and al-Abdāl i.e. the substitutions through Analogy or Qiyās.

Imām Abū Ḥanīfah holds that it is not lawful to establish anything of this kind by Analogy. His view is,

however, not correct because the verse (of Qur'ān relating to Analogy) is general in urging considerations and cannot be particularised without any evidence.

SECTION. 4 : ~~WELL-KNOWN AND~~ The BASIC CAUSE (AL-'LLAT AL-WĀQIFAH).

According to us (the Mālikites) ~~reason~~ the basic cause ('illat) is vaild and sound.

For example the reason of the prohibition of excess in Dīnārs and dirhams is the fact that these are the roots on which prices and coasts of the perishable objects depend. But the Ḥanifite authorities do not consider the'illat (reason) as sound.

Our argument is what we have said ~~before~~ that Analogy (Qiyās) is an evidence of the Sharī'ah which may be particular (Khāṣṣ) and general ('Āmm) like a statement.

SECTION. 5 : JURISTIC EQUITY (ISTIḤSĀN).

Ibn Khuwayz al-Mandād has mentioned that the meaning of al-Istiḥsān which has been adopted by some Mālikites is "to hold an opinion (based) on the strongest reason". For example particularising sale of unplucked fruits of palm trees (C/14b) from the sale of ruṭab (Juicy dates) in exchange of tamar (dried dates) due to the Sunnah available in this concern. It is sure that were there no decision of allowing the sale of the unplucked dates in exchange of tamar, it would not have been lawful, since it

would have been like the sale of rutab in exchange of tamar. This is ~~to what the jurists have inclined to treat~~ the view held by him and is considered as proof and evidence ~~and~~ which he call~~s it~~ Istihsan. And this is not ~~Istihsan does not~~ can be impossible concerning a right known as the ~~repudiate any custom or any established rule~~ root of a business.

The jurists differ in establishing Istihsan which means "to assume a view without proof and precedence". Some authorities of Basrah from among the Malikites and Hanafites have asserted it while our Iraqi authorities and the al-Shafi'ites have rejected it.

The argument in favour of what we say is the fact that such Istihsan challenges reasoning without argument; it is therefore obligatory to nullify its very root when it is used whimsically.

SECTION. 6 : USE OF LEGAL MEANS (ZARAI').

Imam Malik prohibits the "use of legal means" (Zarai'). It denotes "a matter which is apparently lawful but is used (with a twist) for doing what is not lawful".

For example you sell an article at one hundered on credit for a period, and then you purchase the same article at fifty in cash. This case is used as a means for selling fifty (mithqal) in cash and one hundered on credit.

The "use of legal means" (Zarai') has been allowed by Abu Hanifah and al-Shafi'i (M/14a).

The proof of our viewpoint is the expression of Allah, the Exalted, "Ask them (O' Muhammad) of the

township that was by the sea, how they did break the sabbath, how their big fish came unto them, visibly upon their subbath day and on the day when they did not keep subbath came they not unto them.(86)

The verse indicates that God has prohibited fishing on subbath day for the Jews and has allowed it on all other days. The Jews, therefore, used to surround them (fish) on the subbath day and closed their outlets and declared, "we have been prevented from fishing, but we do it on all other days." This is (C/15a) the form of Zarāi' or the 'use of legal means'.

The other proof that also proves our viewpoint is the expression of Allāh . "O 'ye who belive, say not (unto the prophet)," Listen to us" (Rā'inā) but say, "look upon us" ('Unzurnā) and be ye listeners."(87)

In this verse the believers have been prohibited not to say (to the Holy Prophet) "Rā'inā" (listen to us), because the Jews used this expression for abusing the Holy Prophet (may peace be upon him). Hence the believers were prohibited from this though they had not intended the same meaning due to which the prohibition was issued.

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(86) Al-Qur'ān, 7 : 163 ;

وسئلهم القرية التي كانت حاضرة البحر اذ يعدون •

(87) Ibid, 2 : 104 ;

يا ايها الذين آمنوا لا تقولوا راعنا و قولوا انظرنا واسمعوا ....

The agreement (Ijma') of the Sahabah also indicates not to use "Zarai'".

(i) Umar ibn al-Khattab said, "O' prople, The Prophet expired and did not explain to us 'Riba'. You therefore avoid 'riba' (usury) and raybah, (doubt)[88].

(ii) When Zaid ibn Arqam purchased a slave girl from his 'Umm walad for eight hundered on credit (and promised to pay when he would get next endowment) and sold her at one hundered in cash, (hearing this) Hadrat 'Ayishah asked her (Zaid's 'Umm walad) to inform him (Zaid) that he nullified his struggle (jihad) in the company of the Holy Prophet if he did not repent on this action.[89]

(iii) Ibn 'Abbas said when he was asked about selling food for a few dirhams before ~~paying a dirham (the price)~~ determining the exchange of the dirham, while the~~re was scarcity of~~ food was delayed.[90]

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(88) Ibn Majah, al-Sunan, Lucknow, 1316 A.H, (K.al-Tijarat) P. 165; the text of the narration reads;

عن عمر ابن الخطاب قال ان آخر ما نزلت آية الرباء وان رسول الله صلى الله عليه وسلم قبض ولم يفسرها لنا فدعو الرباء والريبة -

(89) Ibn Athir al-Jazari, Jami' al-Usul, Cairo, 1368/1949, Vol, I, p. 876;

عن ام يونس قالت جاءت ام ولد زيد بن ارقم الى عائشة - فقالت : بعته جارية بثمانمائة درهم الى العطاء ثم اشتريتها منه قبل حلول الاجل بستمائة وكنت شرطت عليه : انك ان بعتها فانا اشتريها منك فقالت لها عائشة - بئسما شريت و بئسما اشتريت - ابلغي زيد بن ارقم انه قد ابطل جهاده مع رسول الله صلى الله عليه وسلم ان لم يتب منه -

(90) Abu Dawud, al-Sunan, Kanpur, 1346 A.H, (K. al-Buyu'), Vol, II, p. 138;

قال رسول الله صلى الله عليه وسلم من ابتاع طعاما فلا يبيعه حتى يكتاله زاد ابو بكر قال قلت لابن عباس لم قال الا ترى انهم يتبايعون بالذهب والطعام مرجى -

SECTION. 7 : ARGUMENT WITH REVERSE MEANING.

To argue with the opposite meaning (Istidlāl bi al-'aks) is valid. Abū Ḥamid al-Asfarā' īnī however, holds that it is unlawful.

The proof of our view is the fact that one who argues (al-Mu'allil) says that the hair is devoid of soul, because were there soul in the hair it would not have surely been lawful to remove it from the living animal. We, therefore, know without any doubt that it is devoid of soul like a feather. This kind of argument is valid since had it been so that life was there in the hair and it would have been ~~so that life was there in the hair and it~~ lawful to take it off a living animal the argument would have been self contradictory.

SECTION. 8 : ARGUMENT WITH PRESUMPTION (AL-QARĀ'IN).

To argue with the contention of facts (al-Qur'ān) is not valid to all our authorities.

Abū Muḥammad ibm Naṣr (91) holds that it is valid;

(91) Abū Muḥammad ibn Naṣr : Abū Bakr ibn 'Abd Allāh ibn Muḥammad ibn Naṣr ibn Warqā al-Awdānī was an Shafi'ite jurist and an Imām of his age. He died in Rabī' al-'Awwal 385 A.H, in Bukhārā city. (Ibn Khallikān, Wafayat al-A'yān, Cairo, 1367/1948, Vol, III, p. 346).

(92)
Al-Muzani also holds the same opinion.

The proof of our viewpoint is that either of the two conjoined words has its own value. It will be correct if one of the two conjoined words is particularized ~~through an indication~~ with a decision besides the one contained therein. It is, however, not valid to combine both these words except with an indication ~~that~~ as the case would have been if they were issued separately.

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(92) Al-Muzani : Isma'il ibn Yahya ibn Isma'il ibn 'Amrw ibn Ishaq Abu Ibrahim al-Muzni (175/791-264/878) was an Imam of Shafi'ites, belonging to Egypt. Since he was from Muzaynah tribe, he was therefore ~~was~~ known as al-Muzni. He wrote several books on jurisprudence like ; (i) al-Jami' al-Kabir (ii) al-Jami' al-Saghair,(iii) al-Mukhtasar, al-Mukhtasar, (iv) al-Manghur,(v) al-Masa'il al-Mu'tabirah, (vi) al-Wathaiq etc, etc. He died in Ramadan 264 A.H. and burried on the side of the grave of Imam Shafi'i.

(Ibid, Vol, I, P. 196; Zirakali, al-A'lam, Cairo, 1378/1959, Vol. I, p. 327).

PART - III

ISTIṢḤĀB AL-ḤĀL

i.e.

ASSOCIATION WITH THE PREVAILING CONDITIONS

CHAPTER - I

ASSOCIATION WITH THE PREVAILING CONDITIONS

SECTION. 1 : KINDS OF ASSOCIATION WITH THE PREVAILING CONDITIONS. (ISTIṢḤĀB AL-ḤĀL).

We have mentioned (in the beginning) that the evidences of the Shari'ah are of three types;

(1) Aṣl i.e. Root,

(2) Ma'qūl al-Aṣl i.e. intelligible meaning of the Root.

(3) Istiṣḥāb al-Ḥāl i.e. Association with the prevailing conditions.

The discourse on the first two (Root and the Intelligible meaning of the Root) has already (M/14b) been recorded. In this place the discussion is on "Association with the prevailing conditions" or Istiṣḥāb al-Ḥāl which is of two kinds:

(i) Istiṣḥāb al-Ḥāl al-Aql or Association with the prevailing conditions on the basis of Intellect. This means that, "when either of the two opponents argues (C/15b) in a case in favour of a certain decision of the Sharī'ah, the other insists to remain on the decision of the intellect". For example, if you question a Mālikite about the obligation of al-witr and he replies that the aim and object is to acquit of one's responsibility (on the basis of intellect), its method is prescribed by the Sharī'ah.

Thus whosoever claims of Sharī'ah and makes it obligatory to be followed, the burden of proof lies on him and this is the genuine way of argumentation.

(ii) Istiṣḥāb al-Ḥāl al-Ijmā' or Association with the prevailing conditions based on consensus. This may be illustrated by the argument of Dāwūd in favour of the sale of an '<u>Umm Walad</u>' on the basis that we agreed on the validity of of her sale before pregnancy.(93)

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(93) Abū Dāwūd, al-Sunan, Kanpur, 1346 A.H, Vol, II, p. 138.

Now whosoever claims contrary to this (Consensus) and prohibits the sale of a slave girl, it is then for him to prove his premises. Such kind of argument is not valid, because the consensus (Ijmā') does not appertain the case of disagreement (on the contrary) it only appertaines the case of agreement.

A proof is only advanced in favour of ~~the~~ {an} occasion {is similar to the occasion for which the proof has been used} for which ~~it has been used for similar occasion~~. The words of the law giver appertaining to a particular occassion shall not (for example) be used as an argument for an occasion that is not relevant.

SECTION. 2 : PROHIBITION (TAḤRĪM) AND PERMISSION (IBĀḤAT) ON THE BASIS OF INTELLECT ('AQL).

Having established this "it is not the function of the intellect to prohibit or to permit (anything)". Lawfulness and unlawfulness are only defined by the Sharī'ah. For Allāh the Exalted declares lawful whatever He wishes and declares unlawful whatever He wishes.

This is the view of the majority of our authorities. Al-Abharī holds that according to the intellect things are (on the side) of prohibition, while Abū al-Faraj al-Mālikī holds that in the judgement of intellect things are (on the side)of lawfulness.

The proof of our viewpoint is the fact that if the intellect necessarily makes any object lawful or unlawful, the Sharī'ah cannot oppose the decision of the intellect since the Sharī'ah cannot sanction anything that opposes reason, Because it is not possible for the Sharī'ah to deny that two is more-than one.

SECTION. 3 : THE BURDEN OF PROOF LIES UPON THE PLAINTIFF (MUDDA'Ī).

Whoever claims denial [negation] of a certain decision (of the Sharī'ah) the burden of proof shall lie upon the plaintiff, as it (the burden of proof) lies upon him who asserts it (a decision of the Sharī'ah). Dāwūd, however, says that the burden of proof shall not lie upon the denier.

The argument in favour of our view is the expression of Allāh; "And they say: None entereth Paradise unless he be a jew or a christian. These are their own desires. Say: Bring your proof (of what ye state) if ye are truthful", (94)

و قالوا لن يدخل الجنة الا من كان هودا او نصارا تلك امانيهم قل ها توا برهانكم ان كنتم صادقين -

SECTION . 4 : DESCRIPTION OF MUJTAHID;

A Mujtahid is described as one who;

(1) Knows (C/16a) the application of arguments to their places on the basis of intellect;

(2) Possesses the knowledge of the method of affirmation and the method of construing in a language and the Sharī'ah;

(3) Is learned in the principles (roots) of faith and the principles of law. He should also posses the knowledge of rules (Ahkam) of the address (al-Khitab) consisting of words indicating general meanings (Umum), commandments (awamir), prohibitions (Nahy), the explained (Mufassal) and unexplained (Mujmal), the text of the qur'an and the Sunnah (Nass) the abrogation (Naskh) and the nature of the consensus of opinion (Ijma');

(4) Is aware of the decision of the Book;

(5) Is learned in the Sunnah, practices of the Sahabah (Athar) and those of the Tabi'un, their ways (of narration) and the distinction between the genuine and the defective ones;

(6) Is learned in the views of the jurists (Fuqaha) from among the Sahabah (the Companions of the Holy Prophet; their followers and their successors and all that they agreed upon and all that they differed;

(7) Is well-versed in the orthography, the syntax and the Arabic language, to understand the meaning of the Arabic expression.

(8) Besides these, he should be honest in religion and reliable in faith and superior in diginity.

When all these qualities of a man reach perfection, he becomes one among the Ahl al-Ijtihad and it is lawful for him to give judgements (fatawa) and is apt to be followed by a common man in whatever fatwa he issues.

CHAPTER - II

FUNCTIONS OF PREFERENCE

SECTION. 1 : MEANING OF PREFERENCE IN ISOLATED TRANSMISSIONS (AKHBAR AL-AHAD).

Preference to a particular isolated transmission (Khabr wahid) means, "the force of opinion in respect of one narration against the other when they contradict each other".

The proof of its soundness is the consensus of the early scholars concerning the priority of the transmission of some narrators as against some others, because of better memory, accuracy in recording and importance of the evidence.

SECTION. 2 : PREFERENCE OF THE CHAINS (AL-TARJIH FI AL-ASNAD).

Having established this preference to one of the conflicting akhbars which cannot be harmonized nor is it known as to which is latter and which former so as to declare the latter as abrogator, is found in two places;

(a) Isnad, the chain of narrators.

(b) Matn, the text.

As for preference in Isnād, it is for the following reasons:-

(1) One of the two khabars is related in a well-known story usually narrated by the people of tradition (ahl al-Naql), and the other khabar is not so. The former is given preference because people accept it with ease and the opinion is strong about its genuineness.

(2) The narrator of one of the two Khabars excels in memory (C/16b) and assertion is to be preferred since the soul relies on his narration and finds comfort and ease in it.

(3) The narrators of one Khabar excels those of the other in number, and therefore that Khabar is preferred, because a bigger group is more prone to avoid negligence and mistake.

(4) The Rāwī (Narrator) of the one Khabar (narration) says, "I heard the Messenger of Allah" and that of the other says, "the Messenger of Allāh wrote to me". The Khabar of the former is to be preferred, becaus hearing from a teacher (the learned) is stronger than learning from a written work.

(5) The Rāwīs (Narrators) of the one Khabar (Narration) unanimously refer it to the Messenger of Allāh while those of the other disagree. The former Khabar will, therefore, be preferred, as it is more remote from mistake and forgetfulness.

(6) The Rāwī's

(6) The Rawis of one Khabar (M/15b) disagree in narrating it from the first rawi in so far as it asserts a decision or negates it while those of the other do not disagree from its (original (rawi) . Hence the latter will be preferred to the former since the latter is indicates of better memory and greater care of memorizing what they heard.

(7) The narrator of one Khabar is himself the hero of the story in which he himself is involved while the rawi of the other Khabar is unrelated (to the story) . Khabar of the former narrator will naturally be preferred, because of his full knowledge of its ins and outs, its importance and the care taken by him for its significance.

(8) The agreement of the people of al-Madinah in practising according to one Khabar necessarily makes such Khabar preferable to the one opposed by them, as al-Madinah is the place of the Messenger (al-Risalah) and the meeting place of the Companions of the Holy Prophet (may peace be upon him). The practice of the people of Madinah is naturally associated with the most sound riwayah.

(9) One Khabar excels the otherin sticking to the scienc of hadith and in diction; it will therefore be preferred, as it indicates its significance for giving fatwa (Judgement and takes into account all stipulations (required for its soundness).

(10) The isnad (chain) of one Khabar is free from idtirab (confusion) in text or sanad while the other is not. The

former is evidently better than the latter in respect of narration and retaining all its conditions.

(ii) One Khabar agrees with the explicit meaning of the qur'ān while the other opposes it. The former is therefore better than the latter (C/17a).

SECTION. 3 : PREFERENCE OF THE TEXT (TARJĪḤĀT AL-MUTŪN).

The discourse on preferring (the text) on the basis of 'isnād' having been recorded, here is the place for discussing the reasons of preference in so far as the "text" is concerned;

(1) In case one of the two texts is free from confusion (iḍṭirāb) and difference (ikhtilāf), and the opposing one open to confusion and difference, the first is apt to be preferred, because it displays agreement and care in preservation.

(2) when the text of the one Khabar deals with the decision in words and the other indicates only its probability, the first text will be preferred for its precision and clear purpose.

(3) when one khabar is independent by itself and the other is not so the former will be preferred to the latter, since it gives the meaning independently with all surety and the other gives surety only after investigation and argumentation.

(4) In case one khabr is employeed for in (settling) a disputed matter while the other is left out, the former

is evidently (M/16a) better than latter.

(5) In case the particularization of one general text is not agreed upon while that of the other is agreed upon, the first is better than the second one.

(6) In case one Khabar does not explain the decision (al-hukm) while the other does it, the second one is naturally preferable to the former.

(7) when the Khabar is effective in issuing judgement while the other is not, the effective one (Mua'ththir) is preferable to the ineffective one.

(8) If a Khabar has a specific reason while the opposing one has no reason, the latter will preceed the former, since former's contention against the other indicates its dependence on its cause.

(9) If a Khabar is prefered in giving judgement against the other in one place, it will enjoy preference to the other in all places.

(10) If a certain meaning is expressed in different words and expressions, it will be preferred to the meaning expressed in the same words narrated by a single Rawi in all ages, since the former is free from error (Ghalat), negligence (Sahw), and alteration (tahrif).

(11) If one Khabar negates any defect among the companions of the Messenger of Allah and the other (C/17b) ascribes it to them, the former will be preferred to the latter, because it suits their excellence, faith and their description and praise mentioned by Allah.

SECTION. 4 : PREFERENCE OF THE MEANING (TARJĪHĀT AL-MA'ĀNĪ).

The discourse on preferring the Akhbār (transmissions) has been recorded. Here the discussion is on "preference of meanings" (Causes), Tarjihat al-Ma'ānī. In other words when two reasonings contradict each other in a particular case and the offshoot or the branch (al-Far') vascillates between two roots (aṣl) it will be lawful to adopt any of these two reasonings and apply it to the other. It is now for the investigator to prefer one of these reasonings, which may take place in eleven ways:-

(1) One cause ('illat) is supported by the Naṣṣ (the text) while the second is not; the former will have preference as the text from the lawgiver (Ṣāḥib al-Shar') is the proof of its validity.

(2) One cause does not refer to its root in the matter of particularisation, while the other does so; the former is, therefore, better, since the relation to the general is aptly derived in speech.

(3) One cause agrees with the basic (aṣl) word, while the other does not; the former will therefore, precede, because the aṣl bears evidence to its word.

(4) One cause may be individual (in character),

having a reflection, while the other is not so; the former will be préferred , since when the cause is individual (in character) and has a reflection the opinio will (M/16b) prevail that the decision concerns it (the cause), because the existence and non-existence of the decision (hukm) depends on the existence and non-existence of the cause (al-'illat).

(5) In case one cause is confirmed by many principles (usūl) while the other is confirmed only by one principle, the former will be preferred, since the opinion derives strength from the principles which attest it; the more it is supported by principles, the sounder will be considered.

(6) One of the two causes refers to an offshoot (far') of a root (asl) of its own '<u>genre</u>' and the other refers to a root of a different '<u>genre</u>' , the former is then obviously more apt to reasoning then the latter; because reasoning with something resembling to its own '<u>genre</u>' (genus) is better than reasoning with something contrary to it.

(7) One of the two causes is favourable while the other is contagious; (C/18a) the former will be preferred

(8) A cause that is common to all its offshoot (issues) is better than the one which is not so.

(9) One of the two causes is general while the other is particular; the former will be preferred .

since more offshoots (Furū') bear witness to its connection with the roots.

(10) If one cause is derived from principles based on a Naṣṣ and the other not so, the former is better than the latter.

(11) If one cause has less descriptions and the other has more, the former will be preferred; because more offshoots and attributes require their proof ~~and~~ ~~will lead to~~ urging more Ijtihād. But a cause freer from more proofs and Ijtihād is better.

And Allāh knows the best.

Here ends the Book al-Ishārah by Abū Al-Walīd al-Bājī on the Principles of Jurisprudence with the grace of Almighty God and his excellent assistance.

I accomplished the book al-Ishārah on 7th day of Ramaḍān 792 A.H. (28th July, 1391 A.D.). It was transcribed by one, Al-Ḥasan Ibn Masʿūd al-Ḥājī al-Mutakawī needing the help of Allāh, the Almighty, who may bless transcriber's parents and all Muslims Āmīn. May peace and blessings of Allah be upon Muḥammad, his family and his associates upto the last day of Judgement. Allāh may be pleased with all the Companions of the Holy Prophet! (Āmīn).

III

(i) GLOSSARY

(ii) CHARTS [illegible]

(iii) BIBLIOGRAPHY

(I) G L O S S A R Y

Ādāb al-Qāḍī : Law of Proceedure of Courts.

'Ādat al-Jārriyah : Enacted custon.

Addilah al-Sharī'ah : Sources of the Sharī'ah.

'Ādil : Righteous, professional witness, notari, an trustworthy witness.

'Af'āl al-Nabī : Actions of the Holy Prophet.

Ahl al-Kitāb : Those who possess the Book (of Allāh).

Aḥkām al-Kitāb : Addressed decisions, Injunctions of Allāh.

Ahl al-Naql : The people of traction.

Ahliyyah : Legal capacity.

Ājir : A person who lets.

Akhbār al-Nabī : Statement of the Holy Prophet.

Al-Kitāb : The Book i.e. the Holy Qur'ān.

'Amad : Deliberate intent.

'Amal al-Madīnah : The judicial practice of the people of Madīnah.

'Āmm : The General sense (of a word or an expression.)

'Amr : Imbrative, Commandment; "demand for action and expression of superiority or annoyance and insistance."

'Amr al-Muṭlaq : The Absolute Imperative; "which does not demand immediate execution of an action".

'Aqār : Immovable property.

'Aqd	:	Contract.
'Aqilah	:	Responsible for a payment of compansation (diyat) in cash or in kind; " a person sharing liability with the person who committed homicide or injury".
Aqwal al-Fuqaha'	:	Statements of the Jurists.
Aqwal al-Nabi	:	Statements, Expressions or sayings of the Prophet.
Ara' al-Fuqaha'	:	Opinions of the Jurists.
'Ariyah	:	Loans of articles by way of accomodation.
'Asabah	:	Clan; agnate.
Asl	:	Root, origine, base; "first source of the Shari'ah through which the Shari'ah Laws are derive i.e. al-Qur'an al-Sunnah and Ijma' ;"
'Ata'	:	Credit (on).
Athar al-Nabi	:	Practices of the Holy Prophet.
'Awl	:	Reduction of shares of heirs.
'Ayn	:	Corporial Property.
'Ayn Majur	:	A thing hired.
Badal	:	Substitution, Consideration.
Ba'in talaq	:	Irrevocable Divorce.
Batil	:	Void nullify invalidity.
Bay'	:	Sale; "Sale of goods for money".
Bay' al-'Araya	:	A contract of barter in dates.
Bay' al-Dayn bi al-Dayn	:	Exchange of obligation for obligation
Bay' al-Muqayazah	:	Bartor.
Bay' al-Ahda (Bay' al-Wafa)	:	Sale of real property with the right of mortgase and sale of article by making condition by saying to the

buyer, "I sel you for the debt which I awe you on the condition that when I repay the debt you will give the article to me".

Bida'ah	:	Capital given to another to be used for the profit of donner.
Bid'at	:	Innovation.
Ḍabṭ	:	Accuracy.
Daf'	:	Nexe deditis; " a claim to rebut the plaintiff's action".
Dalīl al-Khiṭāb	:	Indication of Expression; " an expression conveying a decision the meaning of which depends on the certain genus (object)".
Ḍamān	:	Liability, compensation.
Dār al-Ḥarb	:	Enemy territory.
Dār al-Islām	:	Territory of the Islamic State.
Darak	:	Default in ownership.
Ḍarūrah	:	Necessity as a depending element.
Da'wā	:	Lawsuit, Claim; "claiming of ones right in the presence of a judge from another."
Dayn	:	Debt, Claim; "a thing on the debit side of an account".
Dhawī al-Arḥām	:	The Cognates, Uterine heirs.
Ḍid (Pl, Aḍdād)	:	Opposit, Contrarity.
Diyānah	:	Forum interhum, faith ,belief, conscience.
Diyat	:	Compensation on murder to heirs.
Dukhūl	:	Consummation (of marriage).
Fāḥish	:	Excessive .

Fahw al-Khitāb	:	Purport of expression; "the expression which is understood from the expression itself as to what is intended by the speaker in accordance with the usual meaning of the word".
Fājir (Pl, Fujjār)	:	The profligate.
Faqīh (Pl, Fuqahā')	:	Jurist, specialist in fiqh.
Far' (Pl, Furu')	:	Positive or substansive law, Offshoot, branch.
Farā'id	:	Succession in General, portions alloted to heirs.
Fard al-'Ayn	:	Individual duty; "the performance of which is obligatoryfor every individual".
Fard al-Kifāyah	:	Collective duty; "the performance of which is obligatory for the community as a whole".
Fāsid	:	Defective, Voidable.
Faskh	:	Cancellation.
Fatwā	:	Judgement; " to give a decision or legal verdict".
Fidyah	:	Compansation (for certain obligation).
Ghalat	:	Error.
Ghasb	:	Usurpation; "to commit a tort; "to take and hold someones property without his leave".
Ghāyah	:	End, object, aim.
Ghayr Muhtamal	:	Improbable"; " the text which is raised to the highest point of explicitness".
Gins	:	Genere, object.
Ghurra	:	Indemnity for causing an aborortion.
Habs	:	Loin; "Retention of a thing to secure a claim".

Hadanah	:	Care of a child by the mother.
Hadd (Pl, Hudud)	:	The fixed punishment, the limits of punishment, Penal Law, Limits.
Hadr	:	Persons who are unportected and against whome no liability.
Hadyah	:	Property brought or sent as gift to someone.
Hajr	:	Interdication, those under a legal bar; " to restrain a person from disposing of property at his will".
Hakm	:	Arbitration; " two letiqating parties employing another person as judge by the consent of both to decid their litiqation and claim in Court".
Halal	:	Lawful, permissible.
Hamal	:	Pregnancy.
Haqiqah	:	Real meaning; "a word which is used for its (designed) meaning".
Haram	:	Unlawful, Prohibited, forbidden.
Hasr	:	Restriction; "word which restricts the expression".
Hazr	:	Prohibition (see Haram).
Hibah	:	Gift; "to give the ownership of property to another without any reward."
Hifz	:	Memory.
Hilah (Pl, Hiyal)	:	Legal device, evation.
Hirz	:	Custody of things.
Hujjat al-Qati'ah	:	The sure proof, binding proof.
Hukm	:	Decision, decree.
Hukm al-Asl	:	The original decision.
Hukm al-Saqit	:	Repealed decision.
'Ibadat al-Thabitah	:	Established (from of) worship.

Ibahat : Permission (See also Mubah).

'Iddat : Waiting period of a woman after termination of marriage.

'Idtirar : A Compelling, a constraining.

Idtirab : Confustion.

Ijab : Proposal.

Ijarah : Hire, lease, rent.

'Ijma' ahl al-Madinah : Consensus of the Madinite Ulema.

'Ijma' al-'Asr : Consensus of the (every) period.

'Ijma' 'asr al-Sahabah : Consensus of the period of companions of the Holy Prophet.

'Ijma' al-Salaf : Consensus of the early scholars.

'Ijma' al-'Ummah : Consensus of the (Muslim) community.

'Ijma' min jihat al-Qiyas. : Consensus on the basis of Analogy or reasoning.

Ijtihad : Individual reasoning, exertion.

Ikhtiyar : Choice or perference to a given opinion.

'Ila' : Dissolutèon of marriage by the husband by swearing that he would have nothing to do with his wife; Oath of abstience from inter-course by the husband; a variant form of repudiation in which husband by the oath abstains from marital inter-course for four months. If he keeps the oath it has the effect of a definite repudiation.

'Illat : Cause, reason.

'Illat al-Mut'addiyah; :The Contagious cause.

'Illat al-Waqifah : The well known cause, the basic or sound reason.

'Illqa' bi al-Hajr (Bay) : An aleatory transaction, sale by throwing; " Buyer throws a stone and whichever article it falls upon becomes the property of the buyer".

Inqrad al-'Asr : Lapse of time.

Iqalah : To annual a contract.

'Iqan : Preciseness.

Iqrar : Acknowledgement, Confession; "to admit the right of someone against oneh ownself."

Iqrar al-Nabi : Approval of the Holy Prophet (on certain decision or action); " an action was done in the presence of the Prophet which he did not refute."

Irsal : Droping a name fmom the Isnad (the chain of narrators).

Isnad : The chain of narrators (of an hadith)

Isqat : Relinquishment (of a claim).

Isti'abal-Gins : Exhausting the Genus.

Isti'arah : Metaphor.

Istibra' : Clearance of pregnancy, acquittance.

Istidlal : Argument, indictive reasoning.

Istidlal bi al-'Aks; : Argument with the reverse meanings.

Istidlal bi al-Qur'an : Argument with the presumption or similarties, presumption-facts.

Istihsan : Juristic equity; " to hold an opinion (based) on the strongest reason."

Istishab al-Hal : Association with the prevailing conditions.

Istishab al-Hal al-Aql : Association with the prevailing conditions based on the intellect.

Istishab al-Hal al-Ijma' : Association with the prevailing conditions based on the consensus of the community.

Ishtira' : Purchase.

Istithna' : Exemption.

Istithna' al-Jumlah : Exemption from sentence.

Istithna' al-Muttasil : Adjoining Exemption; " a kind of speech in which a part depends upon another part."

Istithna' min al-Gins : Exemption from the Genus.

'Itq : Manumission; " making free (a slave)".

Ja'iz : Lawful, unobjectionable, valid; " an action that is lawful in the Shari'ah

Jalad : Flogging, (jaladah; " flogging punishment in penal Law")

Jariyah : Slave girl.

Jinayat : Crimes, Torts, delict; " offence against the person".

Jizyah : Poll-tax, "taxes on non-muslims",

Kafalah : Guarantorship, Bailment; " to add obligation in respect of a demand for something",

Kaffarah : Atonement, Religious expiation, something legally enforced.

Kalam al-'Arab : Arabic expression.

Karahiyyat : Disliking, duress.

Khabar : Statement, report, Transmission, news (Literaly a reported description).

Khabar Musnad : Connected transmission; " a hadith whose chain of narrators reached upto the Prophet".

Khabar Mursal	:	Disconnected transmission; " a hadith whose chain of narrators (isnad) does not reach the Prophet".
Khabar Mutawatar	:	Continusous transmission; " a hadith which is unanimously reported by the narrators".
Khabar al-Wahid	:	Isolated transmission; " a hadith narrated by a single rawi ('transmittor)"
Khamr	:	Wine, intoxicating liquide.
Kharaj	:	Lend tex.
Khasm	:	Opponent, party to a lawsuit.
Khass	:	Particular; "Sense (of a word or expression)".
Khilaf	:	Disagreement.
Khitabah	:	Negociation for the marriage engagement.
Khiyanah	:	Embezzlement.
Kitabah	:	Undertaking; " to give a written undertaking to a slave that he will be free on paying a certain amount mentioned therein".
Kinayah	:	Allusion, implicit declaration.
Khiyar	:	Optio; right or reservation.
Khiyar	:	Stipulated right of cancelation.
Khiyar al-'Ayb	:	Option for defect.
Khul'	:	Dissolution of exiMated by wife; "Divorce in which the wife redeems herself from the marriage for an consideration," An exchange of assets for separation.
Lafz al-Gins	:	Generic nouns; "word indicating Genus".
Lafz al-Izafah	:	The Genetive word.
Lafz al-Mubhimah	:	Equivocal word.
Lafz al-Nihy	:	Negative word.
Lahn al-Khitab	:	The tone of the expression; " that part of expression (damir) without which the

discourse (kalām) is not completed."

Li'ān : Accussation (of adultary); "the husband affirms under oath that the wife has committed unchastity or that the child born of her is not his, she, if the accusation arises, affirms under oath the contrary; a kind of dissolving marriage.

Luqtah : Lost property.

Ma'dhūn : A slave who has been given permission to trade.

Maḥḍar : Written record of proceedings.

Mahr : Dowary; nupital (wedding) gift.

Majāz : Secondary meaning (of a word); " a word which is usded other than its own meaning."

Majnūn : The Insance.

Māmūn : Honest.

Ma'nā al-Khiṭāb : Intention of Kalām, meaning of expression Analogy; " application of either of the two known object to the other to affirm or avert a certain decision on the basis of something common to both".

Mandūb Ilayh : Recommended; " disregard of which does not necessarily result in the infliction of some punishment".

Manṣūṣ 'Alay : Supported by the text.

Mansūkh : The abrogated.

Ma'qūl al-Aṣl : Intelligible meaning of the root; " which is understood by al-Qur'ān, al-Sunnah, and Ijmā' of the muslim community".

Marwī 'anhu : The rāwī (narrator) from whom the ḥadīth is narrated.

Mashfū' : Real property subject to pre-emption.

Mashru' : Recognized by the Sharī'ah Law.

Maṣlaḥa : The public interest.

Ma'ṣūm	: Invoilable, Protected by the criminal law.
Matan	: Text.
Ma'tūh	: A person of unsound mind.
Mazhab	: View ; "legal opinion/School of law". (with "of a" written above "opinion/School")
Māzūn	: A person released from restraint.
Mu'āmalāt'	: Pecuniary transactions.
Mu'āriz	: Contradictory.
Mua'thth͟ir	: Effective.
Mubāḥ	: Indifferent; "neither obligatory, recommended nor reprehensible or forbidden" ; Permissible.
Mubāra'ah	: The dissolution of marriage by agreemen with mutual waiving of any financial obligation.
Mubham	: Ambiguous (declaration).
Muḍārabah	: Sleeping partnership; "a portnership where one finds the capital and the other the labour".
Mudda'ā 'alayh	: Defendent.
Mudda'ī	: Plaintiff, claiment.
Muffaṣṣal	: Detailed Precise, Explained, Elaboratio (of an expression of ward); " which conveys its full meaning by the its expression only and does not need furth explanation".
Mufāwaḍah	: Unlimited mercantile partnership; " partornership on equal terms".
Muflis	: The bankrupt
Muhaqqalah (Bay')	: Sale of wheat in the ears or of a foetus in the womb.
Muḥtamal	: Probable; " a word which bears two or more meanings".
Muḥtamal al-Ẓāhir	: Probable which is explicit in a certain meaning.

Mujazifah : A bargain in the lump.

Mujmal : Concise, Unewplained (Expression or word).

Mukallaf : The subject, responsible.

Mukhabarah : Renting of an agricultural land by paying a portion of the product aft harvest.

Mukhatab : The Addressee.

Mu'min (Pl, Muminun): The beleiver.

Munabazah (Bay') : Sel in which the article is thrown to the boy or indicating the completion of sale.

Mulamasah (Bay') : An aleatory transaction, sale by tauching the goods.

Muqayada (Bay') : Sale of goods for goods in exchange of good, barter.

Muqayyid : Conditioned (word).

Muqayyida (Bay') : Change of specific property with other specific property.

Murabaha : Rosab with a stated prophet, Transaction on the cost price stating some prophet.

Murahabah : The age of male or Female not in the state of purberty (12 years in case of male 9 years in case of female).

Muqata'ah : Rent for waqfland.

Musaqat : Lease of fruite gardons for an stipulated period.

Musha' : A thing containing undivided shares.

Musharikah : Joint ownership, Co-opratives.

Mushrikat : Poythiest woman.

Muslim (Pl, Muslimun) : The faithful.

Mustaqil bi - Nafsibi : Independent by itself.

Mut'ah : Temporary marriage.

Mutlaq : Absolute (word).

Mutliqah : Divorced woman.

Muwakkil : principle; "The person who appoints the agent in his place.

Muwalat : Contract of clientship.

Muzara'ah : Renting or lease of agricultural land.

Mu'zzarat : Penal Laws.

Nafaqah : Maintenance.

Nafy : Refusal, fanishment.

Nahw : The (Knowledge of) syntax.

Nahy : prohibition, void, unlawfull.

Nahy 'ala wajh al-Tahrim : prohibition in so far as the object is unlawful.

Nahy 'ala wajh al-karaha : prohibition in so far as the object is disliked.

Nass : Text.

Nasi'ah : Delay, deferred payment.

Naskh : The abrogation; "Cancellation of a (previous decision or withdrawal there of caused by another decision came after wards."

Nasikh : The Abrogator (See also Naskh).

Naqd : Cash.

Naql : Traction, transcribtion.

Nikah : Marriage.

Nisyan : Forgetfulness.

Nukul : Refusal (to take the oath for).

Nuqsan	:	Omission; " word Omitted in an expression ".
Qabul	:	Acceptence.
Qada'	:	Forum externum, the duties of a judge; " Judgement given by a Qadi ".
Qadhf	:	Fals accusation of unchastity.
Qard	:	Loan without profit.
Qur' (Pl, Quru')	:	Menses period, monthly course.
Qarinah (Pl, Qara'in)	:	Presumption, similarity.
Qasm	:	Oath.
Qawl	:	Statement.
Qawl al-Nabi	:	Statement or Expression of the Holy Prophet.
Qisas	:	Retaliation; " punishment of death or injury in viwe of the same."
Qiyas	:	Analogy, Reasoning; " application of either of the two known objects to the other to affirm or avert a certain decision on the basis of something common to both".
Qiyas al-jali	:	Explicit reasoning.
Qiyas al-Khafi	:	Implicit reasoning.
Qiyas al-Shibhi	:	Resubled reasoning.
Rahn	:	Mortgage, pledge, pawn, security.
Rahn al-Musta'ar	:	To borrow with leave to pledge.
Raji'i Talaq	:	Revocable divorce.
Rajm	:	Stoning to death, a punishment in penal law.
Ras al-Mal	:	The capital of a buisness.
Rawi	:	Reporter Transmitter, Narrator (of an hadith).

Raybah : Doubtful (Action).

Rayah : Opinion, View.

Riba' : Usury, Excess.

Ribh : prophet from a work or buisness.

Riwayat 'ala wajh al-ijazah : Permitted transmission = an hadith the permission of which is obtained or given for narration.

Ruju' : withdrawl (from the early opinion), revocation, retractation.

Rukn : Essential element, Essense.

S

Sabab : Cause.

Sabi : Minor.

Sadaqah : Alm, chairity.

Safih : Irresponsible.

Sahabi : Companion of the Holy Prophet.

Sahib al-Shar' : Law giver (usually used for the Holy Prophet).

Sahih : Genuine, valid, legally effective, authentic.

Sahm : Fixed share of an heir.

Sahw : Mistake.

Salam (Bay') : Sale contract for deliver with pre-payment.

Salat al-Khawf : Performence of the prayer in fear.

Saqim : Defective.

Sarf (Bay') : Sale of money for money.

Shahid : witness, testimony.

Shara' al-Islam : Islamic Laws.

Shart. : Stipulation, prerequisit, condition, legal formularies.

Shighār : Giving one's daughter or sister in marriage to another man in consideration to the latter giving his daughter or sister in marriage to former.

Ṣifat : Attribute.

Ṣuftajah : Bill of exchange.

Shuf'ah : Pre-emption.

Ṣulḥ : Amicable settlement, compromise.

Sunnah : The Model conduct of the Holy Prophet; "Expressions (aqwāl), actions (af'al) and approvals (iqrār) of the Holy Prophet" ; precedence from the Prophetic way.

Ta'ajub : Exclamation, Admiration.

Ta'āruḍ : Confliction, contrarity.

Ṭabaqāt : Biographies of Lawyers (Jurists) arranged by Classes or generations.

Tadbīr : Promise; " to promise a slave that he will be free on the death of the master."

Ta'dīl : To declare a narrator trustworthy.

Tahdīd : Threat.

Tafrīq : A dissolution of marriage.

Tafwīḍe : Conflict of equivalent testimonies.

Taḥlīl : A device to remove an impediment to marriage.

Taḥrīf : Alteration.

Taḥrīm : Prohibition; " An action or thing invalid in the Sharī'ah Law."

Ta'jīz : To show someone incapable of something

Taklīf : Legal responsibility, obligation of doing or not doing.

Takhyīr : Choice.

Ṭalāq	Divorce, repudiation; "Dissolution of XX marriage by the husband".
Ṭalāq al-ṭalāq	A form of conditioned divorce.
Tanāquṣ	Estopped.
Taqdīm wa takhīr	Reversion of an order (in an expression).
Tarakah	The property (moveable or immoveable) left by the deceased person.
Ṭarīqh al-Lughah	Linguistic method.
Tarīqah al-Shar'	Legal method.
Tarjīḥ	Preference.
Tarjīh fī al-Akhbār'	Preference in transmissions.
Tarjīh fī al-Isnād'	Preference in chains (of the transmission).
Tarjīḥāt al-Ma'ānī	Preference in (one or two) meanings.
Tarjīḥāt al-Matan	Preference in text.
Taṣṣaruf	Disposition.
Tawaqquf	Stop to do or say anything.
Tawliyah (Bay')	Sale at the cost price.
Ta'wīl	Interpretation.
Thaman	Price of a thing sold.
Thayyibah	A women separated by death of her husband or by divorce, a girl who is not virgin.
Thiqah	Trustworthy person.
'Uhda	Law of warranty, "guarantee, against specific faults in a slave or animal."
'Ummah	Muslim community.
'Ummah al-'Āmmah	The commanally; "the common man of the community".

'Ummah al-Khassah	:	Learned men; " the choses people of the community".
'Umm walad	:	Female slave who has born a child to her owner.
'Uqubah	:	Law of punishment, punishments.
'Urbun (Bay')	:	Sale of articles by depositing a portion of price in the condition of approval of the purchaser and deposition of the remaining balance within stipulated period.
'Urf	:	Common usage; " a word is coined for for a certain kind of article and then it is predominatły used for a particular type of that very kind of article".
Usul al-Fiqh	:	Principles of Laws Jurisprudence.
Wadi (Bay')	:	Sale at less than cost price.
Wadi'ah	:	Deposit; " commission for holding property in safe custody".
Wajib	:	Obligatory; " disregard of which results in the infliction of that imperative in some punishment".
Wajib 'ala al-Tarakhi	:	Obligatory (action performed with delay)
Wakalah	:	To carry a business for someone and to make someone of standing in his place in respect of that business.
Wala'	:	Relationship of client and patron.
Wali	:	Legal guardian.
Warathat	:	Inheritance.
Wasiyyat	:	Will, legacy.
Warith	:	Heirer.
Wathiqah	:	Written document, dead, legal document.
Wujub al-'amr	:	Obligatory Imparative.

Wuqūf : Abeyance (of right and legal effects)

Yamīn : Oath, under taking.

Zāhir : Explicit; " a meaning which hastens t the understanding of the hearer from among the meanings which the word bears".

Zarā'i' : Use of the legal means; " a matter (or problem) which is apparently lawful but is used (with a twist) for doing what is not lawful".

Zawj (f. zowjah) : Husband.

Zihār : Dissolution of marriage by the husban saying to his wife that she was like the back of his mother.

CHRONOLIGICAL TABLE

OF

THE RULERS OF UMAYYAID DYNASTY IN SPAIN.

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(1) 'ABD AL-RAHMĀN. I. AL-DĀKHIL.

From; Dhī al-Haj 138 A.H, i.e. May, 756 A.D.
To ; Jamad al-Thānī, 172 A.H. i.e. Nov: 788 A.D.

(2) HISHĀM, I, IBN ABD AL-RAHMAN.

From ; Jumādah al-Thānī, 172 A.H. i.e. Nov, 788 A.D.
To ; Safar, 180 A.H. i.e. April 796 A.D.

(3) AL-HAKAM, I IBN HISHĀM.

From ; Safar, 180 A.H. i.e. April, 796 A.D.
To ; Dhī al-Haj, 206 A.H. i.e. May, 822 A.D.

(4) 'ABD AL-RAHMĀN II, IBN AL-HAKAM.

From; Dhī al-Haj 206 A.H. i.e. May, 822 A.D.
To ; Rabī' al-Thānī, 238 A.H. i.e. Aug: 852 A.D.

(5) MUHAMMAD I, IBN ABD AL-RAHMĀN.

From ; Rabī al-Thānī, 238 A.H. i.e. Aug: 852
To ; Safar, 273 A.H. i.e. Aug: 886 A.D.

(6) AL-MUNDHIR, IBN MUHAMMAD.

From; Safar, 273 A.H. i.e. Aug: 886 A.D.
To; Safar, 275 A.H. i.e. July, 888 A.D.

(7) 'ABD ALLĀH, IBN MUHAMMAD.

From; Safar, 275 A.H. i.e. July, 888 A.D.
To ; 'Safar, 300 A.H. i.e. October, 912 A.D.

(8) 'ABD AL-RAHMAN III.

From; Safar 300 A.H. i.e. October, 912 A.D.
To ; Ramdhan, 350 A.H. i.e. October, 961 A.D.

(9) AL-HAKAM II, IBN 'ABD AL-RAHMAN.

From; Ramadan , 350 A.H. i.e. October, 961 A.D.
To ; Safar, 366, A.H. i.e., September, 976 A.D.

(10) HISHAM II, IBN AL-HAKAM II.

From; Safar, 366 A.H. i.e. September, 976 A.D.
To ; Jamadah al-Thani, 399 A.H. i.e. March, 1009 A.D.

(11) MUHAMMAD II.

From; Jamadah al-Thani, 399 A.H. i.e. March 1009 A.D.
To ; Rabi' al-Awwal, 400 A.H. i.e. Nov, 1009 A.D.

(12) SULAYMAN .

From; Rabi' al-Awwal, 400 A.H. i.e. November, 1009 A.D
To ; Shawwal, 400 A.H. i.e. May or June, 1010 A.D.

(13) MUHAMMAD II, (for the second time).

From; Shawwal, 400 A.H. i.e. May or June, 1010 A.D.
To ; Dhi al-Haj 400 A.H.i.e. August, 1010 A.D.

(14) HISHAM II. (for the second time).

From; Dhi al-Haj, 400 A.H. i.e. August, 1010 A.D.
To ; Shawwal, 403 A.D. i.e. April, 1013 A.D.

(15) SULAYMAN , (for the second time).

From; Shawwal, 403 A.H. i.e. April, 1013 A.D.
To ; Muharram, 407 A.H. i.e. July, 1016 A.D.
(After this ruler 'Ali Ibn Hamud won the political powers and ruled on the Dynasty from Muharram 407 i.e. July 1016 A.D. to Ramadan 408 A.H. i.e. April, 1018 A.D.).

(16) 'ABD AL-RAHMAN IV.

From; Ramadan, 408 A.H. i.e. April, 1018 A.D.
To ; Safar 409 A.H. i.e. Jan, 1019 A.D.
(After this member of the House of Umayyah again the power went in the hands of Hamudites and Al-Qasim ibn Hamud and Yahya ibn Ali ruled upto Ramadan, 414 A.H. i.e. December, 1023 A.D.)

(17) 'ABD AL-RAHMAN, V.

From: Ramadan, 414 A.H. i.e. December, 1023 A.D.
To : Dhi Qa'dah, 414 A.H. i.e. March, 1024 A.D.

(18) MUHAMMAD III.

From : Dhi al-Qa'dah, 414 A.H. i.e. March, 1024 A.D.
To : Rabi' al-Awwal, 416 A.H. i.e. May, 1025 A.D.
(Yahya ibn 'Ali, Hammudite King, again ruled upto
Rabi' al-Awwal 418 A.H. i.e. May, 1027 A.D.)

(19) HISHAM, III.

From: Rabi' al-Awwal, 418 A.H. i.e. May, 1027 A.D.
To : 422 A.H. i.e. 1031 A.D.

GENEALOGICAL TABLE

ON

THE RULERS OF UMMAYID DYNASTY IN SPAIN

CRONOLOGICAL TABLE

OF

THE RULERS OF SARAGOSSA STATE (SPAIN)

(i) Banī Tujīb

(1) Al-Mundhir Manṣūr b. Yaḥyā
(403/1012 to 414/1023)

↓

(2
(2) Yaḥyā Muẓaffar b. Mundhir
(414/1023 to 420/1029)

↓

(3) Mundhir b. Yaḥyā
(420/429 to 431/1039)

↓

(.... Banī Hūd)

(ii) Banī Hūd

(4) Sulaymān b. Hūd al-Musta'īn bi Allāh
(431/1039 to 438/1046)

↓

(5) Aḥmad I b. Sulaymān al-Muqtadir bi Allāh
•(438/1046 to 474/1081)

↓

(6) Yūsuf b. Aḥmad al-Mu'taman
(474/1081 to 378/1085)

↓

(7) Aḥmad II. b. Yūsuf al-Musta'īn b. Allāh
• (478/1085 to 503/1101)

↓

(8) 'Abd al-Mālik b. Aḥmad 'Imād al-Dawlah
(503/1109 to 513/11Ḃ9)

↓

(9) Aḥmad III b. 'Abd al-Mālik Sayf al-Dawlah
(513/1119 to 536/1141)

↓

(Christians)

SETTLEMENT OF QAHATANITS IN SPAIN

(An abstract taken from Fajr al-Andalus by Dr.Husain M Munis)

ا- مواضع سكنتها مجموعات متساوية تقريبا من قحطان وعدنان :

(١) اشبيلية ونواحيها

(عدنان)	(قحطان)
مرة بن ذبيان - غطفان - عك - غافق - هوازن بن عكرمة -	هوازن - جذام - الاشعر - جزيلة - ثوابه - بلى - لخم - مراد - ليص - الخبارين مالكه - الانصار -

(٢) البيرة وغرناطة

(عدنان)	(قحطان)
خزيمة - اسد - مرة بن ذبيان - تميم بن مضر -	طيئ - همدان - غسان - الحضارمة -

(٣) وادي آش

(عدنان)	(قحطان)
خويلد	سعد العشيرة

(٤) بطليوس

(عدنان)	(قحطان)
زهرة	حضارمة

ب - مواضع غالبية من نزلها من قحطان (اليمنيون) :

(١) سرقسطة ونواحيها

(عدنان)	(قحطان)
———	خزرج - عذرة - قضاعة - تجيب - كندة - جذام - ....

د - مواضع لم يسكنها الا قحطانيون :

....

(٥) برشلونة

(عدنان)	(قحطان)
———	تجيب - ....

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Al-Abharī : Muhammad ibn ʿAbd Allāh ibn Muḥammad ibn Ṣāliḥ, Abū Bakr al-Tamīmī al-Abharī (289 A.H./902 A.D.-375 A.H./986 A.D.)

Al-Asfarāʾīnī : Aḥmad ibn Muhammad ibn Aḥmad, Abū Ḥāmid as-Asfara'ini (344 A.H./955 A.D.-406 A.H./1016 A.D.).

Dāwūd al-Asbihānī : Muḥammad ibn Dāwūd ibn ʿAlī ibn Khalaf al-Aṣbihānī al-Ẓāhiri, (255 A.H/869 A.D.-297 A.H./910 A.D.).

Abū al-Faraj : ʿAbd Allāh ibn Ṭayyib, Abū al-Faraj (d. 435 A.H./1043 A.D.).

Abū Ḥanīfah : Numʿan ibn Thābit, Abū Ḥanīfah (80 A.H./699 A.D.-150 A.H./767 A.D.).

Abū al-Ḥasan ibn Muntāb :

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Khuwayz Mandād : Muhammad ibn Aḥmad ibn ʿAbd Allāh, Abū ʿAbd Allāh Ibn Khuwayz Mandād (d. 390 A.H./1000 A.D.)

Mālik : Mālik ibn Anas ibn Mālik al-Aṣbaḥī, Abū ʿAbd Allāh Imām (93 A.H./712 A.D.-179 A.H./795 A.D.)

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Al-Muzni : Isma'īl ibn Yaḥya ibn Isma'īl ibn 'Umraw ibn Lahaq. Abū Ibrāhīm al-Muznī (175 A.H/791 A.D- 264 A.H./878 A.D.).

Ibn al-Qaṣṣār : Hamadūn ibn Ahmad ibn 'Imārah, al-Qaṣṣār (d. 271 A.H./884 A.D.)

Shāfi'ī : Muḥammad ibn Idrīs ibn al-'Abbās ibn 'Uthmān ibn Shāfi' al-Hāshimī, Abū 'Abd Allāh, (150 A.H./767 A.D.-204 A.H./820 A.D.).

Al-Sayrafī : Muḥammad ibn 'Abd Allāh Abu Bakr al-Sayrafī, (d. 330 A.H./942 A.D.).

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